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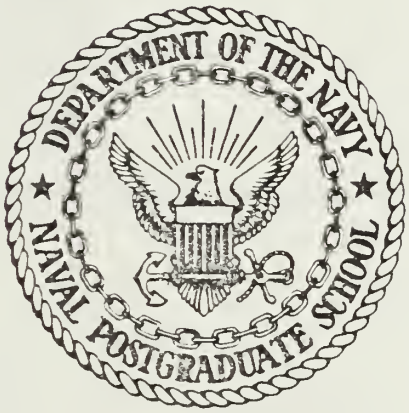

THESIS

AN ANAYLSIS OF PROPOSED AND CURRENT REGULATIONS CONCERNING LOBBYING COSTS IN DEPARTMENT OF DEFENSE CONTRACTS

by

Rhys Sueur

June 1984

Thesis Advisor: D. C. Guyer

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The results of this research indicate that: (1) politics have overshadowed the merits of the lobbying issue in many

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An Analysis of Proposed and Current Regulations Concerning Lobbying Costs in Department of Defense Contracts

by

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ABSTRACT

The purpose of this study is to analyze the Department of Defense (DOD) attempts to regulate lobbying costs in Government contracts. The study reviews all DOD efforts in the lobbying area since 1977, and discusses policy changes, critical responses, and the rationale behind the approach.

The results of this research indicate that: (1) politics have overshadowed the merits of the lobbying issue in many instances; (2) no one has a quantitative figure of the amount of lobbying costs charged to Government contracts; and (3) there is no solid consensus on what activities constitute lobbying and how they should be regulated. The researcher proposes continued evaluation of the DOD lobbying costs regulations to obtain better data and ascertain the magnitude of the costs involved in lobbying in DOD contracts, and the DOD regulatory approach.

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I. INTRODUCTION

A. AREA OF RESEARCH

This research effort is directed at analyzing the issues surrounding the allowability of lobbying costs in Federal grants and contracts. Three primary regulations are examined: the Federal Acquisition Regulations (FAR 31.205-22) for Defense Department procurement; The Office of Management and Budget Circular A-122 (OMB A-122) for non-profit grantees; and The Uniform Lobbying Cost Principles Act of 1984 (S.2251) sponsored by Senator David Durenberger.

B. RESEARCH QUESTION

The primary research question is: What effect will the proposed changes to Federal regulations concerning the allowability of lobbying costs have on the relationship between private industry and the Federal Government? Secondary questions addressed are:

1. What is the definition and applicability of lobbying costs according to law and regulation?
2. What are the political implications and ramifications of proposed and current regulations?
3. What is the position of private industry on the regulations?
4. What is the position of the Department of Defense on the regulations?

5. What effect will the regulations have on Department of Defense buying organizations and private industry?

6. What effect will the regulations have on Congressional procedures?

C. SCOPE OF THESIS

The scope of this thesis is limited to an analysis of The Department of Defense's (DOD) attempt to regulate lobbying costs since 1977. Due to the close relationship of DOD's endeavors and those of The Office of Management And Budget (OMB) in revising Circular A-122, an analysis of OMB's proposal was also conducted. This study did not attempt to compare these regulatory proposals with any others for form, content or applicability. Personal interviews were limited to selected Congressional staff members, selected DOD acquisition policy personnel, selected OMB personnel involved in the regulations, and selected defense contractor representatives.

D. METHODOLOGY

Initially, a literature search was conducted utilizing current periodicals, Congressional Hearings, Government publications, and Government and industry correspondence concerning the allowability of lobbying costs in Federal procurement. Correspondence was then conducted with Congressional staff personnel, Department of Defense procurement managers, Office of Management and Budget personnel concerned with Circular A-122,

and private industry organizations and lobbyists. Finally, personal interviews were conducted with key officials of the aforementioned organizations to clarify the primary issues uncovered in the preliminary research.

E. ORGANIZATION OF THE THESIS

In addition to the Introduction, which provides the reader with a general description of the research effort, this thesis consists of four main segments.

1. Background and History

This segment analyzes the various definitions of lobbying utilized in Federal regulations and the inherent problems associated with defining lobbying. In addition, it details the history of regulating lobbying activity in Government grants and contracts by executive agencies and Congressional actions. It concludes with a description of the current and proposed procurement regulations on lobbying.

2. Theory

This segment examines the accounting concept behind cost allowability in Government contracts and the applicability of the lobbying regulations on the various types of contracts. It presents the purpose of the regulations and what the executive agencies are attempting to accomplish with their position on lobbying. The question of regulation versus legislation is discussed to set the tone for the political ramifications stirred by the lobbying issue.

3. Issues, Data Presentation, and Analysis

In this third segment, the primary issues and concerns of the regulations and the rationale presented for positions taken by the interested parties are examined. An analysis of these issues is presented detailing the logic and support for the positions taken. Although this analysis will be primarily based on research data, the researcher's observations will also be utilized to address conflicting opinions and views.

4. Conclusions and Recommendations

The researcher's conclusions and recommendations are presented in this final segment. Conclusions drawn are the result of the information and data presented, and the recommendations are the author's opinions regarding the best feasible solution to the problems presented.

II. BACKGROUND AND HISTORY

A. REGULATION OF LOBBYING

The potential abuse of utilizing Federal funding for lobbying purposes considered not in the best interest of the public has been a recognized problem for a number of years. The attempt by the Office of Management and Budget (OMB) through the proposed change to the Federal Acquisition Regulations (FAR) 31.205-22 (Appendix B) of April 1984 are the latest attempts by the Executive Department to solve this problem. The Uniform Lobbying Cost Principles Act of 1984, (S.2251) (Appendix C) is the most recent Congressional approach to the allowability of lobbying costs in Federal Government grants and contracts.

The results of the attempts to regulate the allowability of lobbying costs have met with limited success and with very little consensus as to the proper action to take on this issue. As seen in Appendix D, a chronology of Executive Branch and Congressional action on lobbying, the attempts by both Executive and Congressional leaders to regulate lobbying have been evolving since 1977 with numerous changes in intent and direction. A primary issue has been the definition of lobbying and the associated costs. Appendix E lists the various definitions that are applicable and have been utilized in the numerous attempts to regulate lobbying costs charged to Government grants and contracts. The various definitions and their differing

scopes depict the problem the Government has experienced in reaching a consensus regarding the nature of lobbying.

B. HISTORY OF LOBBYING REGULATIONS

1. The Period Prior to Formal Department of Defense Regulations--1977-1980

The first attempt by DOD to regulate the allowability of lobbying costs was brought about by Congressional action and the results of the Defense Contract Audit Agency (DCAA) audits in 1977. Interest by Senator William Proxmire in the regulation of lobbying was instrumental in the first DOD regulation. In a letter to then Secretary of Defense Harold Brown, Senator Proxmire questioned the use of acquisition funding to pay for contractor lobbying since DOD spent time and money on liaison with Congress on specific budget requests [1:2]. In addition, results of DCAA audits of ten major defense contractors for the period of 1974-1975 questioned expenditures of over eleven million dollars for five of the contractors' Washington offices [2:1]. With the lobbying issue in full public view, DOD proposed a change to the Armed Services Procurement Regulations (ASPR) (Appendix F) in December of 1977. This proposal defined lobbying only as attempts to influence the Congress and stated that both direct and indirect costs associated with this activity were unallowable.

The reaction by industry to the proposal began a pattern that would continue throughout future efforts to regulate

lobbying costs. The primary objections centered around the authority of an executive agency to regulate lobbying costs and the necessity for supplying information to Congress to aid the legislative process [3:1]. Finding it difficult to define lobbying, the proposal was subsequently dropped by DOD with no action taken by Congress or the other executive agencies.

In 1979, DOD again tried to regulate lobbying costs with a November 26, 1979 proposed change to DAR (Appendix G). This proposal was very similar to the 1977 proposal and was concerned primarily with attempts to influence the Congress. Unlike the 1977 proposal, DOD sought the concurrence of the other executive agencies and the acceptance by the Office of Federal Procurement Policy (OFPP). While OFPP found DOD's cost principle acceptable [4], another pattern was set when the General Services Administration (GSA) and the other civilian agencies, felt the DOD initiative was not strict enough in the areas of state, local, and foreign lobbying costs [5]. Failing to get any consensus on the lobbying cost principle, DOD withdrew the proposal. The reasoning supplied was that the cost principles could result in higher contract administration costs with little appreciable increase in cost disallowances, and that contractors either voluntarily eliminated or agreed to the disallowance of lobbying costs that were to be regulated [6].

After the withdrawal of the second DOD proposal, Senator Proxmire turned to OFPP to propose a comprehensive cost

principle dealing with lobbying for the entire Federal Government [7:2]. OFPP sided with DOD concluding the current regulations and audit guidelines were adequate and that Congress might desire to formulate legislation to address the lobbying issue [8]. Although no action was taken by the Congress or other executive agencies, the impetus for action was still present in various articles and political speeches which finally lead to the first lobbying cost standard.

2. Changes to the Defense Acquisition Regulations--1981-1982

In October of 1981, DOD, under the direction of Secretary of Defense Casper Weinberger, added a new cost principle, DAR 15.205.51, to regulate lobbying costs (Appendix H). In doing this, the tone of the Reagan Administration's reaction to lobbying was set with Secretary of Defense Weinberger stating, "I feel strongly that Government contractors should not be permitted to charge to defense contracts the costs of lobbying the Congress in an attempt to get additional defense contracts" [9:A-1]. The primary difference between this cost principle and the ones that would follow, centered around the concept of legislation liaison. In this initial regulation, these costs were allowable.

At the same time DOD was formulating its cost principle, it appeared that Congress might also take some action. Senator David Pryor introduced a bill (S.1969) to prohibit the Government from paying for lobbying costs for defense

contractors [10]. The bill never got out of committee, and DOD remained the sole regulator of lobbying costs.

In November of 1982, the DAR was changed again at the direction of Secretary Weinberger, to prohibit contractors from being reimbursed for all lobbying costs, including legislative liaison costs [11]. This stricter cost principle, detailed in Appendix I, was part of the effort to alleviate fraud, waste, and mismanagement in Defense contracting [12]. Also in November, GSA issued a regulation prohibiting contractors from charging the costs of their lobbying activities to the price of their contracts with Federal civilian agencies [13]. This regulation--detailed in Appendix J--differed from the Defense Regulation in the critical area of legislative liaison. The GSA regulation did not make all legislative liaison activities unallowable. For the period from November 1982 until the current change to the FAR, the treatment of lobbying costs was different for the various Government agencies.

3. The Office of Management and Budget Proposed Change to Circular A-122 and the Other Executive Agency Proposals--1983-1984

Although DOD and the civilian procurement agencies had cost principles on lobbying, there was no regulation on non-profit organizations, and there was no uniformity in the agency regulations. On January 20, 1983, this changed when OMB issued a proposed change to Circular A-122 (Appendix K), and the other agencies issued similar proposals to their

respective regulations. These proposals drew immediate criticism from all concerned, including DOD and GSA, who indicated the proposal was entirely the initiative of OMB.

Congressional Hearings were held on March 1, 1983 by the Subcommittee on Legislation and National Security, chaired by Congressman Jack Brooks. The reason for the hearings was concern with the receipt of Federal funds depending on a waiver of First Amendment rights by the contractors and grantees [14:2]. Although the hearings were held primarily on the proposed Circular A-122, the other agency regulations were examined due to their duplication of purpose. The results of the Congressional Hearings brought forth the following list of the most objectionable unallowable items in the regulations:

1. communications with any Government official or employee who may participate in the decision-making process
2. direct or indirect funding of political action committees
3. The entire salary of individuals who participate in any form of political advocacy
4. any building or office space where more than five percent of the usable space is devoted to activities constituting political advocacy
5. any equipment or other items used in part for political advocacy
6. meetings and conferences devoted in any part to political advocacy

7. membership in an organization that has political advocacy as a substantial organization purpose, or that spends one hundred thousand dollars or more per year in connection with political advocacy [15]

Due to the opposition to the proposals, led by Congressman Brooks, all the proposals were withdrawn.

Although Congress and much of the private sector concerned with defense contracts were opposed to DOD's position on lobbying, Secretary Weinberger did not amend the DAR concerning lobbying costs. His views on disallowing lobbying costs were reiterated in his answer to a request to withdraw the regulation.

> Over the past few years there has been considerable concern expressed by both the Congress and the Administration that it was unreasonable to include the costs of contractor lobbying activities in the cost used to determine reimbursements to contractors furnishing services and products to DOD. Those expressions of concern have neither changed nor diminished. Accordingly, I plan to retain the DAR Cost Principle that pertains to lobbying [16].

In November 1983, OMB and the other executive procurement agencies issued new cost principle proposals (Appendix L, M, N). Unlike the January proposals, there was not total uniformity between the organizations. A new controversy was raised between DOD coverage and that of OMB. The DOD proposal made legislative liaison activities and lobbying at the state and local levels unallowable costs. This disparity in the regulatory approach was severely criticized. The major changes to OMB's proposal answered many of the most vocal

critics in the following manner:

1. the expansive term "political advocacy" was changed to "lobbying and related activities" for clarity [17:731]
2. the concept of standard cost allocation for unallowable activities was utilized to replace the initial concept of total disallowance of an activity involved with lobbying [18:2]
3. The proposal did not cover:
    a. "lobbying at the local level (covered under the current DAR)
    b. "appearances before Congress or state legislatures at their written request (covered under the current DAR)
    c. "contracts with Executive Branch officials, other than in connection with the veto or signing of enrolled bills, or attempts to use state or local officials as conduits for unallowable activity
    d. "litigation on behalf of others not directly authorized by grant or contract
    e. "lobbying at the state level that would affect the organization's ability or cost of performing a grant or contract (covered under DAR)
    f. "the entire cost of membership dues to trade associations or other organizations which have lobbying as a substantial organizational purpose" [17:731]

Although these changes corrected many complaints, two areas were still viewed as being highly unacceptable: the

provision requiring contractors and grantees to certify that they have complied with the lobbying cost principles and the "twenty-five percent rule" concerning record keeping [17:705]. The "twenty-five percent rule" requires contractors and grantee employees to maintain auditable records of lobbying activities when they spend more than twenty-five percent of their time in lobbying activities. After holding hearings on the new proposal, Congressman Brooks was still not satisfied and demanded additional changes to the regulations [19].

After months of negotiating between DOD, OMB, GAO, and Congressional staffs, new proposals were issued on April 27, 1984 [23:749]. The most significant changes in the proposal were:

1. "Related activities" was deleted from the definition of lobbying
2. legislative liaison is now only unallowable "when such activities are carried on in support of or in knowing preparation for an effort to engage in unallowable lobbying
3. "technical assistance to Congress can be provided on either oral or written request, by staff members or Congressmen, and if a notice is in the Congressional Record
4. "the way to determine whether the 'twenty-five percent rule' applied
5. "the manner of 'how lobbying costs are to be identified in indirect cost rate proposals'" [23:749]

In addition, the language of the FAR and OMB proposals were

almost identical with no major difference on unallowable and not disallowable activities.

While the executive agencies were attempting to produce an acceptable cost principle on lobbying, Congress was also focusing on the lobbying issue. In many appropriation bills, including Defense, a rider was attached, directly affecting the issue of lobbying. In stating that "none of the funds made available by this Act shall be used in any way, directly or indirectly to influence congressional action or any legislation or appropriation matters pending before Congress" [21], Congress made it evident that it was opposed to Government reimbursement of lobbying expenses. However, the question of what constitutes lobbying was still not answered. The introduction of Senator Durenberger's bill to correlate the definition of lobbying with the Internal Revenue Service Code is the current Congressional attempt to resolve this issue.

C. DESCRIPTION OF THE CURRENT PROPOSALS

The present focus on the allowability of lobbying costs centers on three regulatory proposals: OMB Circular A-122; FAR 31.205-22; and S.2251. All are currently under review to attempt to define the lobbying policy.

1. Circular A-122

The following primary activities are considered not allowable:

A. "Federal, state, or local electioneering and support of such entities as campaign organizations, and political action committees

B. "Most direct lobbying of Congress and... state legislatures, to influence legislation

C. "Lobbying of the Executive Branch in connection with decisions to sign or veto enrolled legislation

D. "Grassroots lobbying concerning either Federal or State legislation

E. "Legislative liaison activities in support of unallowable lobbying activities" [64:18261]

The following items are not disallowed:

A. "lobbying at the local level

B. "lobbying to influence state legislation, in order to directly reduce the cost of performing the grant or contract, or to avoid impairing the organization's authority to do so

C. "Lobbying in the form of a technical and factual presentation to Congress or state legislatures at their request

D. "Contracts with Executive Branch Officials other than lobbying for the veto or signing of enrolled bills" [64:18261]

It should be noted that because an item is considered not unallowable does not automatically make it allowable. The specific terms of the grant, contract or other agreements are the determining factors as to allowability of these items [17:733].

2. FAR 31.205-22

This proposal incorporates all the unallowable activities and not disallowed activities in Circular A-122.

3. Senate Bill S.2251

The effort of Senator Durenberger to legislate the allowability of lobbying costs limits the unallowable activities to attempts to influence legislation. Unallowable activities would be attempts at trying to affect the opinions of the general public, and communication with legislative or other Government officials who are formulating legislation. Items considered not unallowable are:

A. providing technical advice or assistance to Congress

B. contracts with Executive Branch Officials

C. local and state lobbying

D. Political Action Committees

There is also a unique requirement which requires contractors and grantees to notify a member of Congress when the technical assistance being provided will result in more than one hundred dollars being charged to the grant or contract [24:2].

As is evident from the history of the various proposals to regulate lobbying costs, it has taken the executive agencies a long time to present a uniform cost principle. The latest proposal is a compromise which is believed by OMB to have achieved the best consensus possible [64:750]. This does not necessarily make it the best possible cost principle and

many issues on how it should be structured still remain. These will be examined in the following chapters to attempt to ascertain the validity of the final proposal.

D. SUMMARY

The attempts by DOD, OMB, and the Congress to regulate lobbying costs have been marked by varied opinions and actions on what to regulate. Starting with the initial DOD proposals restricted to regulating attempts to influence Congress, the various proposals have branched out to encompass legislative liaison activities, political advocacy, and state and local lobbying. The latest proposals by the executive agencies appear to have centered on regulating attempts to influence legislation at various governmental levels.

III. FRAMEWORK AND THEORY

A. ACCOUNTING CONCEPT OF COST ALLOWABILITY

The primary reference in the determination of the allowability of a particular item in Federal Government grants and contracts is the Federal Acquisition Regulation (FAR). Five factors listed in section 31.201-2(a) of the FAR for determination of cost allowability are:

1. Reasonableness
2. Allocability
3. Standards promulgated by the Cost Accounting Standards (CAS) Board, if applicable, otherwise, generally accepted accounting principles and practices appropriate to the particular circumstances.
4. Terms of the contract
5. Any limitiations set forth in this subpart [25:31-7, 31-8].

To determine reasonableness, Section 31.201-3 of the FAR gives necessary guidance. A reasonable cost is one which does not exceed what a prudent person would accrue in the conduct of business in its nature or amount [25:31-8]. To implement this definition, four considerations are employed.

1. "whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance
2. "the restraints or requirements imposed by such factors as generally accepted sound business practices, arm's-length bargaining, Federal and State laws and regulations, and contract terms and specifications

3. "the action that a prudent business person, considering responsibilities to the owners of the business, employees, customers, the Government, and the public at large, would take under the circumstances

4. "any significant deviations from the established practices of the contractor that may unjustifiably increase the contract costs" [25:31-8].

In addition to reasonableness, the concept of allocability must be examined to determine cost allowability. The FAR defines an allocable cost as one that is "assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship" [25:31-8]. Section 31.201-4 of the FAR further delineates direct, indirect, and overhead costs that are allocable to Government grants and contracts. Costs are allocable if:

1. "incurred specifically for the contract

2. "benefit both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received

3. "necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown" [25:31-8].

When a cost has been determined to be unallowable, directly associated costs are also considered unallowable [25:31-8]. In addition, records are required to be maintained which are

"adequate to establish and maintain visibility of identified unallowable costs, including directly associated costs" [25:31-8].

The costs of lobbying under the current proposals appear to be in accordance with the above listed guidelines. Indirect as well as direct costs are covered under the proposals and only the portion of a cost item that is actually used in lobbying activities is considered unallowable [17:732]. Although the extent of record keeping required to justify the allowability of lobbying costs is not specifically defined in the proposals [18:8], indirect cost employees who certify they spend less than twenty-five percent of their time on lobbying or related activities are not required to maintain any documentation for audit purposes [22:6]. This exemption would not apply to organizations that have materially misstated allowable or unallowable costs in the past five years [17:733].

The interpretation of the guidance on cost allowability and its application to the lobbying cost proposals is not without critics. The Department of Defense Inspector General believes a major weakness of the proposals is their lack of clarity concerning the allowability of activities of indirect cost employees where less than twenty-five percent of their normal time is spent on lobbying [26:1]. He is concerned that "any judgemental estimate by the contractor would be very

subjective and would establish a poor precedent for future cost principles on accounting for both allowable and unallowable costs" [26:2]. Mr. Bowsher of the General Accounting Office (GAO) is further critical of the regulations and is of the opinion that there should be a better way to handle the lobbying cost allowability issue. He believes that the answer is for the executive agencies to achieve better consistency in what is considered an allowable cost and what is an unallowable cost [15:66]. Secretary Weinberger, however, believes that more regulation is necessary. His opinion that "there are far too many items allowed for reimbursement anyway, and I think it does nothing but undermine public support for what we are trying to do" [27] was one of the primary motivating factors behind the earlier restrictive DOD proposal. This lack of any clear consensus within the various Government branches on how the subject of cost allowability should be handled, greatly exacerbated the formulation of lobbying cost regulations.

B. APPLICABILITY TO VARIOUS CONTRACT TYPES

The extent of regulation of lobbying costs is dependent on the type of contract a contractor enters into with the Government. The type of contract determines the audit considerations and examination of costs that the Government will conduct. Lobbying cost allowance or disallowance would only apply to negotiated procurements of both fixed price or cost

reimbursement contracts [28]. Due to this, critics of the proposal have voiced objections to the discriminatory nature of the proposals. The objection centers around the issue that a company would have to maintain separate accounting systems depending on the type of contract for which it is competing. A company doing identical work in the private sector, utilizing a fixed price non-negotiated Government contract, and utilizing a cost plus fee Government contract would have to maintain three separate accounting systems [15:183]. Since there are other unallowable costs that must be similarily handled by contractors, this objection does not appear to have significant substance in the issue of lobbying costs.

C. PURPOSE OF THE REGULATIONS

The purpose behind the executive agencies' actions are seen by many of the involved groups to represent more than the idea of determining the allowability of a specific cost. In these viewpoints, the political implications, which will be discussed in subsequent chapters, appear to play a prominent role. David Horowitz of OMB was quoted as stating,

> ...this is really a test of whether the broad public interest can duke it out, toe to toe, with a broad collection of special interests. As I see it, that is what this Administration was elected to do--to clean up that comfortable arrangement between public money and private interests [29:1].

This is further amplified by the preamble of Circular A-122 which explains that Federal money used for lobbying purposes

"distorts the political process" and gives grantees and contractors an advantage over groups with different political aims [18:7]. Whatever the actual facts, the appearance of Government support for subsidized positions through lobbying reimbursement is not viewed as being in the Government's best interest [15:38]. On a less political plane, the avowed aim of Circular A-122 was to establish a comprehensive Government-wide set of cost principles to ensure Government funds are not used for lobbying purposes [22:1]. Answering their critics that existing regulations are sufficient, OMB cites both GAO and the various Government Inspectors General's comments regarding the inadequacy of the existing regulations [30].

Not everyone is convinced of the stated aims and intentions of OMB. Some members of Congress suspect that the ulterior motive of OMB was to "defund" liberal groups not liked by the current Administration rather than to stop the use of lobbying with Federal funds [31]. Congressman Waxman expressed his disdain for OMB's approach by stating, "it sounds to me like you are just throwing up trial balloons and seeing who shoots at them. Don't you do some study in advance to try to determine whether the proposals you put forward make sense or not" [15:54]?

An important aspect of the purpose of the regulations is what the proposed regulations do not do. The proposals of both OMB and DOD do not attempt to voice an opinion on the

merits or lack of them concerning lobbying. There is no attempt to restrict the amount of lobbying a particular grantee or contractor can do [17:705]. The regulation is only on cost recoverability. In issuing their original proposal, OMB stated that "the administration will continue to award grants and contracts to those parties who are most effective in fulfilling statuatory purposes (and that) political advocacy groups may continue to receive grant and contract awards" [32:3350]. Another important concept is that the regulations do not apply to individuals receiving some type of Government compensation but only to grantees and contractors [15:46].

While the original OMB proposal was touted as a "comprehensive Government-wide policy", it was not perceived by Senator Durenberger to have achieved that result. Therefore, his bill was designed to provide legislative guidance to the executive agencies to provide a true Government-wide policy [33]. The failure of the executive agencies to reach an acceptable consensus brought about Congressional action. With the latest uniform cost principles issued by OMB and the other agencies, the necessity of the Durenberger legislation has been questioned.

D. REGULATION VERSUS LEGISLATION OF LOBBYING

As seen in the previous section, the question of which branch of the Federal Government should introduce restrictions

on lobbying costs is an important issue. OMB has continuously expressed the view that it is their role to administer grants, and that Congressional action is not needed [20]. The rationale for the OMB position is as follows:

1. "delegated authority from Congress and the President to manage the Executive Branch with a view toward economy and efficiency, as it affects the agencies' exercise of their grant administration function" [17:734]
2. the first amendment of the Constitution, criminal statutory restrictions of 18 U.S.C. 1913, and several Congressional appropriation riders regarding the use of appropriated funds for lobbying [34:5]
3. The Budget and Accounting Act and The Budget and Accounting Procedures Act which has been exercised through previous Circulars and upheld by the Justice Department [15:44].

OMB's view on its authority to issue a cost principle on lobbying is not shared by everyone. Many Congressmen believe that OMB has misused their authority to regulate grants in this area and that it is an institutional prerogative of Congress to handle this issue [35]. Others are of the opinion that if the January 1983 proposal by OMB had not been so sweeping and controversial, this entire issue would not have been raised by the Congress [31]. A legal opinion expressed by Jack H. Maskell of the Congressional Research Service states that

> no authority cited by OMB appears to delegate legislative authority to the agency to institute a policy of Government "neutrality" in prohibiting the use of Government funds to further private speech and petition activities, nor any specific or general authority to promulgate rules and regulations to broadly construe applicable provisions of law affecting the legal rights and responsibilities of private organizations in this area (34:ii].

Senator Durenberger, in formulating his legislation, has taken the position that comprehensive policies on lobbying should be legislated rather than regulated by the executive agencies [36:3]. The American Civil Liberties Union and many other organizations have supported this position in testimony and correspondence to OMB [15:199].

Another position taken by many critics of the lobbying cost principles relies on the assumption that Congress has taken a position on this issue through various actions and inactions. As Maskell points out, "OMB may be instituting new restrictions on grantee and contractor advocacy activity substantially beyond those which Congress envisioned" [34:12]. Another view supports the premise that, in the absence of Congressional action, it is improper for OMB to unilaterally presume that the use of Government funding for lobbying is unallowable [37]. Since there have been various Congressional statutes on lobbying, OMB's position that these laws are not comprehensive has also been attacked. "That theory may be faulted as an assertion of administrative authority to adopt controls that Congress repeatedly chose not to adopt" [38:1].

The issue of Circular A-122's compatability with existing legislation has raised additional issues in the arena of regulation versus legislation. The position of OMB is that their proposal does not override statutory law, specifically allows any costs where Congress has directly authorized the use of appropriated funds for unallowable activities, and is consistent with the broad thrust of Congressional policy on lobbying [17:735]. This position has been attacked by the GAO and legal experts. They feel that Congressional riders on appropriation bills making lobbying costs unallowable have applied only to the Federal agencies and not contractors or grant recipients [31]. The riders have been attached to only prohibit Government employees from lobbying Congress for approval of specific agency programs. Maskell also points to the fact that appropriation riders only apply to "publicity and propaganda" campaigns directed at "legislation pending before Congress" and not the other areas that Circular A-122 has regulated [34:i].

In addition to the debate over who has the regulatory authority in the lobbying issue, the rationale behind why the executive agencies desire regulation over legislation has had an affect on Executive action to date. It is perceived by the DOD that the regulatory approach gives them more flexibility. A law is seen to have potential for ambiguity with the intent having to be determined through applications [28].

Also, there exists the strong possibility of an adversarial relationship between the agencies and the private sector over the lobbying issue [28].

E. SUMMARY

The understanding of cost allowability, the type of contracts that will be affected, the express purpose of the executive agencies' proposals, and the controversy of regulation versus legislation are keys in correctly analyzing the regulation of lobby costs. While the first three are rather straightforward and well documented in the regulations, the resolution of the regulatory versus legislation approach to the allowability of lobbying costs is beyond the scope of this thesis. It has been presented as background material to enhance the development of specific issues in the ensuing chapters.

IV. GENERAL ISSUES CONCERNING THE REGULATIONS

A. APPLICABILITY

The question of which organizations are required to comply with the regulations has been used as an issue by the critics of both OMB Circular A-122 and the DOD regulations. Circular A-122 applies to all non-profit grantees and non-profit contractors except hospitals, institutions of higher education, state and local governments, unions, and many research organizations [39]. The FAR provisions apply to all prime and subcontractors with primarily the same exceptions noted above. In both cases, the proposals will affect grants, contracts, and other agreements entered into after the effective date of the regulations being issued [32:2248].

The exemptions mentioned previously appear as discriminatory to many affected organizations and contrary to the expressed aims of the proposals. A group most critical of the OMB position, OMB WATCH, voiced concerns over the exemption of hospitals, higher education, and state and local governments who, it says, receive over 95% of all Federal grants [39]. In the area of research funding, the exclusion of universities seems to give them a competitive advantage over small businesses [15:256]. The exemption of unions is seen as being highly discriminatory by many and it has been theorized that this exclusion will give the unions an unfair

advantage in the political arena [15:186,256]. It was never made clear by the critics as to how the union exclusion would affect any grant or contract.

On a more general level, a controversy exists concerning the application of the same type of regulations to both non-profit and contractor organizations. The non-profit viewpoint is that they should be exempted from lobbying restrictions while contractor lobbying is inappropriate, since it only benefits the contractor [39]. OMB WATCH takes the position that "a non-profit organization's advocacy on behalf of a disadvantaged segment of the population...should not be put on the same footing as a large contractor's entertaining Congressmen to win votes for new weapon systems [39]. On the contracting side, it is felt that Government contractors should not be subjected to the same regulations intended for the "conduct of public charities" [15:399].

Achieving a consensus on a lobbying regulation by everyone seems impossible. If the aim is to ensure Federal funds are not used for lobbying, exempting certain groups and organizations appears to create unnecessary conflict. A lobbying cost principle that is equally applied to all who receive Federal contracts and grants might eliminate any concern over discriminatory application and could be a step toward achieving the intended goal.

B. ENFORCEABILITY

OMB has taken the position that new regulations on lobbying are necessary due to the difficulty in enforcing the current laws and regulations [15:37]. According to their viewpoint, there are no enforceable restrictions already in place. This position has been attacked on the grounds that the failure to enforce existing laws and regulations is a poor reason to institute new regulations [15:186]. Research has failed to discover any existing legislation or regulation that disallows lobbying costs except in the most direct sense of lobbying, i.e., direct attempts to influence legislation.

The primary vehicle for enforcement of the proposed regulations is voluntary compliance by grantees and contractors [17:735]. The concept that this reliance on the good faith of the organizations will make enforceability difficult if not impossible, is not seen as a major problem by the executive agencies [20]. Senator Durenberger, utilizing the same scope of enforceability in his legislation, also does not foresee major problems. His view is that "auditors will continue to have the discretion to disallow reimbursement for such activity when it is not an ordinary and necessary expenditure within the purpose of the grant or contract" [33]. Enforcing the regulations by placing the burden on the organizations by making them certify the allowability of any lobbying related costs for reimbursement, is seen as a proper

alternative or precursor to costly and extensive enforcement [40:15].

The penalties for lack of compliance with the regulations are divided into minor or unintentional violations and more serious cases [17:735]. For the less serious infractions, the organization will be required to reimburse the particular Federal agency for the misspent funds [17:735]. For cases considered more serious, contracts and grants can be suspended or terminated and offenders can be debarred or suspended from further awards [17:735].

Although the Government agencies proposing the regulations are not concerned with the reporting requirements, the lack of required documentation has raised the question of enforceability. The DOD Inspector General in reviewing the prior DOD proposal stated that "without time logs and other documentation of the activities engaged in, it will be impossible to determine, after the fact, the percentage of time an employee devoted to lobbying and related activities" making a large portion of the cost principle unenforceable [26:2]. Others have also argued that self certification makes the cost principles difficult, if not impossible, to enforce [41:817].

The question of how to enforce the regulations must be weighed against the cost of more rigid requirements. A regulation that is totally disregarded due to its lack of enforcement serves little purpose. However, the cost of maintaining

extensive documentation would be very high and passed on to the Government as an allowable cost [42]. To implement the proposals as written, with the option of more stringent documentation procedures if considered necessary in the future, would balance the enforcement issue and be a start in regulating lobbying costs.

C. EFFECT ON ACQUISITION COSTS AND CONTRACTOR COSTS

The question of whether or not a regulation is cost effective has long been an issue concerning the merits of the particular regulation. In analyzing the lobbying cost principles, one would need to know the amount of money one would save by imposing the restrictions and the cost to implement the proposed regulations. The question of the amount of money being charged to the Government for lobbying has not been totally addressed. In Congressional Hearings, representatives of GAO and OMB testified that neither has conducted any study to quantify lobbying costs [15:54,67]. In his analysis of the proposed Circular A-122, Maskell points out that "there were no hearings, findings, nor record of abuses, or waste of Government funds in the area of lobbying... to demonstrate the cost savings or increase in efficiency and economy to the Government which would result from these restrictions" [34:18].

The effect the regulations will have on Government acquisition costs in the contract administration area is a divided issue between the Federal Government and the private sector.

OMB representatives do not foresee any increase in contract administration costs [20]. The Director of the Defense Acquisition Regulatory System, James Brannan, also sees no effect on contract administration costs [43]. The Navy DAR Council Representative, Mr. Ed Williamson, does not foresee any increase in audit costs with the new regulations, but he did foresee the possibility of an effect on other administrative costs [28]. Although he did not view the cost increases as major, Mr. Williamson felt that accounting costs might rise in the time allocation and record keeping areas [28].

The private sector did not share the opinion of the Government officials and felt that contract adiministration costs would definitely rise. The magnitude of the cost increase was felt to depend on the outlook and attitude of auditors as interpretations were made of the gray areas in the regulations [44]. Many contractors feel that the ambiguity of the regulations will lead to expensive and time-consuming disputes over whether actions of legislative liaison are lobbying related or normal allowable business practices [45:2].

A particular cost item in the regulations that the private sector viewed as increasing acquisition costs to the Government centered around the Defense Department's prior disallowance of all local and state lobbying costs. The prevailing industry opinion is that local and state lobbying is aimed at reducing contractor operating costs and improving contract

efficiency [46:3]. The results of these endeavors would be of direct benefit to the Government and reduce costs throughout the acquisition process. This issue has been resolved with disallowance of state and local lobbying being deleted from the FAR proposal.

The monetary effect of the profits of industry is another area where the quantifying of costs has not been thoroughly conducted. Interviews with representatives of Lockheed, Ford Aerospace, and Boeing indicated that there was not enough data available at this time due to the relative newness of the DOD regulations [42,44,47]. It was, however, generally agreed throughout the private sector that these proposals would increase the cost of doing business with the Government [14:2]. An unnamed official of a large defense contractor was quoted as estimating the proposals prior to the November change could cost his company approximately twenty million dollars per year [29:372].

The consensus in the defense industry is that the regulations will have direct cost impacts on all levels of acquisition. The taxpayer is seen as the direct recipient of these costs in the long run [15:179]. The Council of Defense and Space Industry Associations (CODSIA) is of the opinion that costs of defense programs will increase due to these regulations in four specific areas. These are a reduction in the flow of information to ensure the acquisition of the best

weapon systems, a reduction in competition, a reduction in industry participation in the defense mobilization base, and a limiting of capital available for investment in productivity enhancement [15:39].

The ultimate question of the effect on acquisition costs concerning the lobbying regulations will not be answered until they are fully implemented and data is collected and analyzed. Although costs should be taken into account with the implementation of every Government regulation, the fundamental question of the overall legitimacy of the allowability of lobbying costs appears to have more bearing on the issue. This question, rather than the cost effectiveness, is the one that should be addressed.

D. MAJOR DIFFERENCES BETWEEN AGENCY REGULATIONS

As previously mentioned, the DOD proposal on lobbying was more restrictive than that of OMB, the other Federal agencies, and the current proposals. There are four areas where costs were deemed unallowable in the Defense Regulations but not in those of OMB, GSA, and NASA.

1. Local lobbying activities

Circular A-122 has not made these costs unallowable because it is felt "there is no rigorous separation between legislative and Executive branches" at the local level [17:733]. This lack of separation would make any regulation of these lobbying costs difficult to enforce.

2. Lobbying and related activities at the state level

Circular A-122 has not made these costs unallowable when the lobbying activity directly affects the ability of the organization or cost to the organization of grant or contract performance [17:731].

3. Providing technical advice or assistance to Congress or state legislatures in response to a written request

4. Legislative liaison activities

DOD did not give any specific reasons for the position they have taken on these differences [48:5]. The primary motivation behind the more restrictive cost principle was the personal view on the lobbying issue of Defense Secretary Weinberger [43]. His strict beliefs that the DOD policy was the proper approach to the lobbying issue created the discrepancies in the regulations. Secretary Weinberger has not made any statements as to why DOD changed its approach, and one would have to wonder if it was for political expediency rather than a change in beliefs.

The stricter application by DOD has been attacked both in Congress and by private industry. Senator Durenberger's opinion is that, without any evidence of "programatic reasons", all the Federal agencies should utilize the same standards [36:2]. Private industry raised the issue of inequitable treatment, and felt that the Government "will have failed to meet its public policy obligations" if the regulations are

not the same [49:7]. Citing the Office of Federal Procurement Policy Act, as amended by Public Law 98-191 and Executive Order 12352, Federal Procurement Reforms dated 17 March 1982, the argument was made that both the President and Congress had stressed the desire for uniform procurement policies [48:5]. The differences were categorized as "punitive, discriminatory, and unfair" by one private sector critic [50:4].

The differences between the DOD regulations and those of the other agencies were attacked on the basis of costs. The possibility of maintaining separate accounting systems for companies that deal with defense and non-defense contracts [51] and the use of multiple overhead rates [52:2] are seen as unnecessary expenses. While not being totally convinced of the necessity for any regulation, the adjustment to a single regulation is considered highly desireable [45].

The current proposals have alleviated all these major differences between the agency regulations. However, it is important to realize the initial position of DOD on the lobbying issue. If DOD in the future decides that the joint regulations do not achieve their desired intent, there is the possibility the particulars noted might be reinstated in the cost restrictions.

One of the main reasons for Senator Durenberger's bill was the inability of the executive agencies to agree on the scope of their lobbying regulations [53:117]. Senator

Durenberger's bill does not call for strict uniformity by agencies, but would require justification on the basis of program needs for any variant in conformance [53:117]. The Durenberger legislation would not restrict legislative liaison, local lobbying and most state lobbying, and would not require a request for technical advice and assistance to be in writing [24:2].

E. SUMMARY

The questions of how the lobbying regulations should be applied to various organizations, how they should be enforced, what the overall costs will be in the acquisition cycle, and to what degree should there be differences among executive agency proposals have been addressed in this chapter. It is necessary to obtain an understanding of these general issues that would apply to any lobbying regulation, prior to examining the specific aspects of the current proposals.

V. CONGRESSIONAL, EXECUTIVE, INDUSTRY INTERACTION

A. CONSTITUTIONAL CONSIDERATIONS

The initial proposed revision to OMB Circular A-122 in January 1983 was attacked by critics on constitutional grounds. With the latest changes, many of the areas where constitutional questions were raised were deleted [34:3]. This did not, however, negate the constitutional issue. In general, it is felt that the proposal violates certain First Amendment rights and other constitutional rights.

The Office of Management and Budget's position is that the proposal is "designed to balance the First Amendment rights of federal grantees and contractors with the legitimate governmental interests of ensuring that the Government does not subsidize, directly or indirectly, the political advocacy activities of private groups or institutions" [32:3348]. In defending its position against critics declaring it is violating free speech, Mr. Wright testified that the issue is what will be reimbursed, and not what will be allowed to be said [15:56]. The Supreme Court Decision, Regan V Taxation with Representation of Washington, stated that the Federal Government "is not required by the First Amendment to subsidize lobbying. We again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State'" [22:10].

The position taken by OMB is not without its supporters. It is felt by some that the OMB proposal will protect the First Amendment rights of the public in its goal to stop the subsidizing of lobbying [15:417]. Others feel there is no violation of any First Amendment rights because it is non-discriminatory in nature, "does not advance or control any political opinion or belief," and does not interfere with the voting process [40:4].

These arguments have not been compelling enough to convince many critics of the constitutional questions raised by the proposal. The American Civil Liberties Union (ACLU) feels the language of the regulations is vague and could lead to alternative interpretations that violate the First Amendment [54:4]. They specifically feel constitutional problems exist on the following grounds:

1. "could be read to require a Federal contractor or grantee to disclose its political activities to the Federal Government regardless of whether the contractor or grantee sought recovery from the Government of any cost associated with such activities, and to disclose all funding sources
2. "the definition of 'unallowable' political activity remains impermissibly vague...encouraging arbitrary and discriminatory application of the definition by Federal agencies
3. "legitimate ground exists for concern that OMB's true aim is to suppress expression as such...a forbidden goal

4. "the rule would make the use of Federal contract and grant funds for certain political activities allowable only for those who, presumably on the basis of the content of their message, can obtain from Congress, on an ad hoc basis, a special invitation to engage in those activities at Government expense

5. "binding advance agreements...is a charter for prior censorship" [54:4,5,17].

Maskell, in his article, agreed with many of the points in the ACLU report and, as previously mentioned, attacked OMB's authority to regulate lobbying costs. Another constitutional issue raised is the retroactive disallowance of all previously allowable costs after an organization decides to lobby [35]. This is seen by both industry and Congress as being highly unfair if not illegal [42].

As previously stated, it is beyond the scope of this thesis to analyze the legal issues raised on the lobbying principles. Throughout the research, many Supreme Court and other judicial decisions were cited by both supporters and critics of the regulations. The utilization of these cases to support varied opinions of the constitutionality of the regulations leads one to believe there has been no specific judicial guidance to expressly cover the regulation of lobbying costs. Therefore, it would seem logical that the executive agencies should again review these cases to ensure they are not in direct

violation. The regulations can then be issued and the courts would then decide any legal violations if and when they are directly raised.

B. POLITICAL IMPLICATIONS/PERCEPTIONS OF LOBBYING

The political ramifications stirred by the executive agencies' proposals on the regulating of lobbying costs is a subjective issue that is difficult to analyze. Mr. Horowitz of OMB emphasized this point by stating that "over the last 10 to 15 years, the interrelationship between what's public and private--what's political and non-political--has become so intertwined that separating them out becomes awfully hard" [29:372]. Supporters of the regulations feel they are necessary to maintain the Government's neutral political role in administering grants and contracts. Without the proposals, OMB feels the Federal Government is able to punish or reward through Federal funding on the basis of an organization's "political advocacy" [32:3348]. They feel that the regulating of lobbying will achieve neutrality by eliminating this possibility of political spoils [32:3348]. The lack of any regulations on lobbying costs has been seen as creating an impression of the Government supporting a particular political ideology [40:2]. This can be viewed as the Government preferring one political ideology over another through Government funding. By disallowing all lobbying costs, no political ideology is deemed superior.

This view of the necessity for the regulations to create Government impartiality is not held by everyone. The regulations are viewed by many as totally political and seen as a grudge match between the Reagan Administration and non-profit liberal groups [35]. To a large extent, the politics has overshadowed the merits of the issues [35]. Congressman Tom Lantos has called the proposal "symptomatic" of the Administration's "narrow...ideological approach to social problems totally divorced from reality" [55:502].

Support of the proposals, with the exception of their applicability to major defense contractors, has been divided primarily on conservative versus liberal viewpoints. The proposals have been categorized as a "conservative effort to defund the left" [56] and a "concentrated effort to defund anyone who is likely to disagree with the Administration" [15:21]. As Congressman Frank stated "...we have people in the Executive Branch who want to make fundamental changes and they don't want to be bothered by a lot of people who are going to tell us what the effects of those changes are" [15:70]. A less emotional response by the critics of the proposals is the fear that Government agencies would use the proposals to solicit input only from "friendly organizations" who support the Governmental views [14:11]. These particular arguments, however, would appear to be difficult to substantiate due to their application to all Federal grantees and contractors,

including the more conservative large business enterprises [34:iii]. The critics do not agree with this with Congressman Frank stating that "the fact that they have to get Lockheed, Boeing, and a few others, I think, is only a minor inconvenience because they think they can figure our some ways around it" [15:71]. Some Defense contractors feel that DOD is being used by the Administration to keep from having to compromise too much with non-profits and their supporters in Congress; and without including all contractors and grantees it would prove impossible to submit any lobbying regulation [47].

In addition to the broad political implications, there is much concern over the equality of the regulations in its application to various groups, and its effect on the participation of organizations in the political system. Congresswoman Patricia Schroeder believes the proposals are purposefully structured to "hurt liberal organizations more that conservative ones, small businesses more than big businesses, and poor organizations more than rich ones" [15:22]. The lobbying regulations have also been seen as forcing most groups to decide between political participation and accepting Government contracts and grants [57:30]. Prior to the latest FAR revision, DOD's position was categorized as possibly making contractors choose between having any contact with their Congressmen or dealing with DOD [50:5].

The disallowance of costs incurred in an organization's support and administration of Political Action Committees is another political area of contention. The opinion that Congress "specifically permitted corporations to use their General Treasure funds to underwrite a PAC's administrative and operational cost" [15:170] through the Federal Election Act [38] has been a major argument of the corporations.

One of the primary areas of controversy that has changed with the latest OMB and FAR proposals concern the regulation of state lobbying. Critics of the proposals felt it was not the place of the Federal Government to dictate what was appropriate lobbying at the state level. Senator Durenberger in his views of the issue is of the opinion that the states should be able to get waivers from OMB if they do not desire to have the Federal funding of lobbying activities restricted [36:2].

It will be impossible to take the political aspects out of any regulations proposed to regulate lobbying. OMB has realized this and has indicated the necessity of support from Congressmen Horton and Brooks for the revision of OMB A-122 to become a reality. An interesting sidelight in the political aspect of lobbying regulations concerns an avowed critic of both the OMB and DOD proposals, Congresswoman Schroeder. While attacking the regulations in hearings as being harsh and punitive, Congresswoman Schroeder was publicly critical

of a perceived lobbying movement by Martin Marietta Corporation. Calling for an investigation by DOD into their lobbying activities, she questioned "whether the narrow, private interests of a corporation should be defining national defense policy" [58]. This tends to reinforce the notion that political expediency has been more important than the actual merits of the lobbying issue. As the Washington Post editorialized, "under the new rules no one should expect the halls of Congress to be left to the tourists" [59]. It appears that the political right or wrong of lobbying depends on what the lobbyist is lobbying for and the politicians' opinions of their views.

Some of the critics of the lobbying cost regulations feel that the proposals are a direct attack on lobbyists in general. They feel that the proposals are punitive because of the low opinions many Government officials have of lobbyists. In attacking the lobbying proposals, Congressman Horton stated, "It's always fashionable to dump on lobbyists. As a social group, they are generally held in low esteem. But...lobbyists perform a very valuable function by making us aware of the concerns of people who are interested in the making of public policy" [15:8]. Milton J. Socolar, speaking for the GAO, agrees with Congressman Horton and feels that "lobbying is not evil per se and is not an activity that "deserves punitive treatment" [60:2]. It is evident that the political philosophy of individuals concerning lobbying issues continually

cause the focus of attention to be taken away from the issue of whether it should be an allowable cost on grants and contracts.

C. TAX DOLLAR USAGE FOR LOBBYING

Almost everyone concerned with the OMB and DOD proposals on regulating lobbying agrees that tax dollars should not be used to lobby Congress. Congressman Brooks, an avowed critic of the proposals, agrees that "...Federal dollars should not be spent by contractors and grantees to lobby the Congress" [15:1]. The Council of Defense and Space Industry Associations (CODSIA), another strong critic, also agreed with this general premise and feels that "...the political process would be distorted if politically-dependent contractors and grantees could use Federal funds to support their goals" [49:1]. The judicial system has also taken a stand on this in Haswell v United States, 500 F.2d 1133, 1140 (Ct.cl.1974). The decision stated that "...the U. S. Treasury should be neutral in political affairs and the substantial activities directed to attempts to influence legislation should not be subsidized" [40:4]. Although there is a strong consensus on the usage of tax dollars for lobbying, there is controversy over how to regulate lobbying and whether any regulation is necessary.

One of the major positions of the supporters of the agencies' proposals is that it is not right for contractors and

grantees to utilize tax dollars for causes that many taxpayers do not agree with [22:9]. Citing the legal case of Abood v Detroit Board of Education, 431. U. S. 209, 235-36 (1977), supporters point to the Court's decision of "taxpayers should not be required, either directly or indirectly, to contribute to the support of an ideological cause (they) may oppose" [40:7]. This point has been contested by opponents led by the American Civil Liberties Union which stated that "any notion that a taxpayer has some rights to insist that his tax dollars not be spent on causes he opposes is obviously untenable" [61:588]. Again, there is no consensus.

An argument used by the critics of the proposals concerns the status of funds that are distributed to contractors and grantees. OMB and DOD have stated that their aim is to ensure that no appropriated funds are utilized for lobbying purposes. Critics feel that once funds have been distributed by the executive agencies they are no longer considered appropriated funds [34:9]. They, therefore, feel that technically contractors are not spending Government money but their own money they earned in performing the contract [44]. In refuting the executive agencies' claims that Congress has repeatedly stated their intentions that tax dollars not be used for lobbying, the critics have claimed that any specific legislation is only applicable to the agencies. Throughout his analysis, Maskell cited Federal court cases to show that any laws, specifically

18 U.S.C. 1913, prohibiting lobbying have applied "only to Federal officers and employees of Federal agencies, and not to private individuals and organizations which receive grants and contracts from a Governmental agency" [34:7].

The critics of the proposals have also raised the issue that it is unfair for the executive agencies to prevent contractors from participating in legislative liaison when the agencies engage in this activity at the taxpayer's expense [62:191]. Congressman Frank stated that "...it is inconsistent for the administration to refuse to pay for political advocacy when the White House has its own political advocate, Edward Rollins" [55:500]. The ACLU advocates this point and feels that "OMB has offered no explanation as to how the use of Federal funds by contractors or grantees for political advocacy would distort 'the market place of ideas' more than the use of Federal resources for such purposes by the President, Congress, or Government officials" [61:588]. While the correctness of this position is extremely difficult to evaluate, it does not appear to this researcher to have a great deal of merit. The concept of equating the necessary interaction of executive agencies and the legislative branch with that of private organizations appears to be without any logical backing.

An issue that has finally been settled with the DOD agreement to adopt OMB's policy is that of using tax dollars for

local lobbying. Contractors put forth the argument that almost all of the local lobbying is for the benefit of the Government [44]. This type of lobbying is conducted for stating a position on zoning, fire and safety regulations, taxes, and the like [44] and to improve the ability of a contractor to perform the contract [47].

D. EFFECT ON FREE ENTERPRISE AND BUSINESS PRACTICES

The current changes to the OMB and FAR proposals have alleviated many of the complaints business organizations had raised. A prior area of controversy concerned legislative liaison restrictions imposed by DOD. Although this issue has been decided in favor of allowing almost all legislative liaison [23:749], the rationale for desiring these costs by industry is important to understand the lobbying dilemma. The primary argument voiced by almost every organization spokesman was that legislative liaison was a normal cost of doing business [63:4]. The knowledge gained by legislative liaison is viewed as "the difference between taking advantage of new opportunities and missing them entirely" [49:2] and a requirement for management in "their responsibility to the owners, employees, customers, the Government and the public at large" [46:2]. Citing the "deduction for political advocacy in section 162(e) of the internal revenue code", CODSIA felt that Congress had recognized the business necessity of legislative liaison [15:402].

The effect of the proposals penalizing contractors and grantees who do business with the Government [50:6] has been an argument used by critics of the proposals. A picture of profit degradation resulting in reduced productivity, reduced plant modernization, and curtailment of competitive parity has been envisioned by Government contractors [15:401]. Using an example of shipbuilding as an industry "almost totally dependent on Federal contracts," [63:1] these proposals are portrayed as putting them at a decided disadvantage to their non-Government counterparts. A major concern of the effect upon business operations centers around small businesses. It is felt that smaller businesses will have a more difficult time than large businesses in absorbing the unallowable lobbying costs [62:191]. It is perceived that small business will have to either attempt to write off lobbying as a business expense to commercial accounts if possible [44], or possibly give up Government contracting business [55].

The major defense contractors feel that lobbying is a necessary business expense and will continue regardless of the regulations [42,44,47]. If the proposals are enacted, there will be a necessary restriction of activities and an isolation of expenditures to keep the record keeping costs down [47]. One possible response by industry will be to try for higher profits on Government contracts to compensate for the lack of recoverability of lobbying costs.

E. INFORMATION FLOW BETWEEN CONGRESS, DOD, AND PRIVATE INDUSTRY

The critics of the executive agencies' proposals have utilized the concept that the proposals will severely affect the flow of information needed by Congress to decide public interest [35]. This information flow is considered necessary by many congressmen and the private sector. A major Congressional concern is that if this information flow is curtailed, they will be hampered in representing their constituents [14:3]. Congressman Weiss testified that the proposals would threaten "...the free flow of ideas, the sharing of diverse perspectives, and the communication of factual information that help mitigate the possibility of unaccountable, harmful, and ill-advised Government decision making" [15:374]. Congressman Horton testified that this "information enables Congress to make far more informed and intelligent decisions" [15:8]. The private sector feels that Congress needs the information it supplies to ensure it procures the best weapon systems [62:191]. They also believe that the proposals limit their ability to converse with their Congressmen on matters where there is no intent to influence legislation [49:4]. Senator Durenberger in presenting his legislation feels that it is better to "err, if we must err, on the side of free and open dialog between legislators and contractors and grantees" [33].

Both OMB and DOD do not see the information flow issue as a major problem. OMB believes the information flow will

not be inhibited because organizations can still communicate using non-Government funds and that anything not strictly forbidden is allowable [20]. They feel that as a practical matter it will have little effect [20]. Ed Williamson believes there will be no effect on information flow because the Government will pay through profits and that corporations will still supply the information whether they are reimbursed or not [28].

As the OMB proposal was originally written, a key area of concern was the requirement for a written request from a Congressman to supply any information to Congress. The latest revision has modified this requirement to "permit oral as well as written requests, allow staff members as well as Congressmen to make the request, and make Congressional Record notices sufficient to invoke the exception" [23:749].

As previously mentioned, and evident from the information presented in this chapter, it appears impossible to achieve a consensus of opinion of the various issues surrounding the regulation of lobbying costs. Since this is the case, it would appear that a decision by Congress and the Executive Department should be made on the merits of whether Federal funds should be utilized for lobbying. Once this decision has been reached, the proposals should be promulgated on the merits of the various arguments expressed and then implemented. Turning the issue into a political football is only achieving more controversy with no results. For the regulations to have any

chance of success, the politics and parochial interests of a few groups will have to be subjugated for the best regulation applicable to everyone.

VI. REACTIONS TO THE REGULATIONS

A. THE NECESSITY FOR THE REGULATIONS--HOW BIG IS THE PROBLEM?

With the current lobbying proposals being set to go into effect on May 29, 1984 [23:750], many critics are still not convinced there was ever a need for the regulations in the first place. Congressman Brooks reported that his initial hearings in March of 1983 did not convince his Committee that there was any evidence to support the necessity for any regulation and that the policies in effect at that time were adequate [14:13]. At the hearings, the GAO representative agreed with Congressman Brooks and gave GAO's position of not predicting any widespread problem necessitating regulation [15:67]. Major defense contractors feel that not only are the regulations not necessary but they will be counter-productive to the procurement process. In its testimony to Congressman Brook's committee, CODSIA embellished this notion. They pointed out the following major flaws in the idea of the lobbying cost regulations:

1. "they would decrease rather than promote full competition in procurement
2. "they would impair rather than improve the quality, efficiency, economy, and performance of Government procurement organizations and personnel

3. "they would add rather than eliminate inconsistencies in procurement laws, regulations, directives and other laws, etc., relating to procurement

4. "they would add enormous complexity rather than greater simplicity throughout procurement

5. "they would impede rather than promote economy, efficiency, and effectiveness throughout Government procurement organizations and operations

6. "they would greatly increase instead of minimizing disruptive effects of Government procurement on particular industries, areas, or occupations

7. "they would destroy rather than promote fair dealing and equitable relationships among the parties in Government contracting" [15:409].

A defense contractor representative felt that the regulations were not beneficial due to his concept that DOD needs contractor lobbying help to ensure a proper defense [44]. His reasoning was that due to lack of resources and time DOD does not properly educate Congressional staffs on DOD procurement to the detriment of major system acquisition [44]. The attempt to regulate lobbying has been categorized as a "solution in search of a problem" [37], "a document which solves an unknown problem" [65:2], and "contrary to the administration's policy of reducing administrative burdens and regulatory control" [15:410].

The executive agencies take the opposite view that the regulations are necessary to solve the problem of Federal funds being used for lobbying. Although their supporters are not as vocal as their critics, the response to the November 1983 proposal "drew 93,600 comments" with approximately ninety-four percent showing support [66]. OMB has continuously expressed the opinion that the public, Congress, and GAO have identified abuses and that regulation is needed [32:3348]. Citing the lobbying campaign of the C-5A aircraft by Lockheed and Boeing Corporations, OMB reported that both companies attempted to charge lobbying costs to the Government through their overhead rates [15:35]. Mr. Wright also stated that, "...commingling of lobbying activities with legitimate contract work and the inability of the current system to enforce rigorous distinctions (left) GAO unable to determine the amount of employee time improperly used." [15:34] Senator Durenberger also believes regulation is necessary. While not necessarily agreeing with all the concerns of OMB as evidenced by his own legislation, Senator Durenberger has stated "that it would constitute poor public policy to force withdrawal of A-122 without replacing it with something better" [24:1]. A more vocal supporter of a lobbying cost principle feels that "because many members of Congress have benefitted from these (lobbying) activities, there has been no rush to regulate the political behavior of these organizations" [15:412].

This issue, like many of the issues concerning a policy to regulate lobbying costs, is difficult to solve with any type of quantitative data. Personal opinions are difficult to refute and emotions many times tend to overcome a logical approach to the problem. However, it appears there is solid evidence that abuses of Federal funds in the lobbying area have occurred. The question of the magnitude of the occurrences does not appear to be known to anyone fully. If they are few, the proposed regulations will indeed solve a problem that does not exist. If they are of any magnitude, however, the savings can only be beneficial to the Government and the taxpayers. This answer can be resolved only over time with workable regulations in effect to monitor the Government savings.

B. RECOMMENDED CHANGES

As it became evident that the executive agencies were not going to totally withdraw the regulations in the storm of controversy that was created, many of the vocal critics turned to recommending changes to the regulations. One major defense contractor representative felt that since there was going to be some form of regulations no matter what the critics did, the best strategy was to attempt to try to have the final product be as permissive as possible [42]. With the latest revision to both the OMB and FAR proposals, it appears that this strategy has been successful to a large degree. There are, however, still areas where critics believe that further changes

to reduce the impact of the regulations would be appropriate in the regulation of lobbying costs.

1. Definition of Lobbying

One of the major issues throughout the attempt to formulate a policy to regulate lobbying costs centered around how to define lobbying. The executive agencies used political advocacy, lobbying and related activities, and finally, simply lobbying as the term they were defining. This was a minor victory for the critics of the proposals who felt the other terms would lead to confusion. However, some critics do not feel that this concession was enough in this area. Contractors believe that the tax code allowance of necessary business expenses, with the exception of items precluded by appropriation acts, should be the basis for defining unallowable lobbying costs [15:407]. The non-profit organizations echo this sentiment and feel that the "definition of lobbying applied by the Internal Revenue Code to nonprofit 501(c)3 organizations" should be utilized in the regulations [18:4]. Since the April proposals by the executive agencies did not adopt either of these proposals, this controversy remains unresolved.

2. Legislative Liaison Activities

Most of the primary matters of contention in the legislative liaison area have been resolved with the April proposals. The latest revisions resulted in both grantees and

contractors being treated equally by the executive agencies that have regulatory authority. The viewpoint of contractors that legislative liaison is a necessary cost of doing business, information received through this activity is necessary for a business to maintain its competitive position, and Congress needs to hear more than the military voice to make wise decisions [47], appears to have achieved its purpose. The Congressional complaint that the Executive Department does not have the right or authority to tell Congress what it can or cannot see or hear [31] has also been overcome with the latest revisions.

Another area where contractors and grantees desired changes to the prior proposals concerned the procedure for giving advice and assistance to Congress. It was felt that a written request was not needed [44,47], and staff member requests or a published public hearing in the Congressional Record should be sufficient [36:2]. The April revisions have alleviated these criticisms. An area that was criticized as being too restrictive but not changed in the latest revisions was that advice or assistance should be "technical" in nature [48:2]. In the April proposal, this area was tightened somewhat to read that "information provided must be 'technical and factual', information that is 'readily obtainable' and which can readily be put in 'deliverable form' and conveyed through 'hearing testimony, statements or letters'" [23:749].

The final controversial legislative liaison area that contractors and grantees wanted changed concerned the treatment of allowable costs incurred prior to a decision to lobby on the issue. As the proposals were originally presented, all costs were considered unallowable when lobbying was conducted. This included otherwise allowable costs that were incurred prior to any lobbying activity. Senator Durenberger is of the opinion that this retroactivity on allowability determination is not fair [36:1]. He feels that it would be "burdensome in terms of paperwork" and would serve as a "disincentive for organizations to lobby on legislative issues on which they had previously conducted allowable legislative liaison" [36:1]. While the new proposals did not totally conform to this opinion, they did make a substantial change. Under the new guidelines, "legislative liaison is unallowable only 'when such activities are carried on in support of or in knowing preparation for an effort to engage in unallowable lobbying'" [23:749].

3. Reporting Requirements

Almost all of the concerns about what records were necessary to be maintained and what information was to be reported concerning lobbying were alleviated with the November 1983 proposals by OMB and DOD. However, Congressmen Brooks and Horton are still not satisfied with the latest proposal in this area. Their primary concern centers around the provision that "would require contractors and grantees to tell

the Government how much they spend on lobbying and identify those costs separately from other expenses" [66]. The two Congressmen are still concerned with the true intentions of the lobbying proposals. Their contention is:

> "...the federal Government has no business asking that information on the political activities of private organizations be separately identified when there is no involvement of federal funds in these activities and when such identification might subject these organizations to discriminatory treatment or other forms of harassment..." [66]

While OMB made many compromises on their initial proposals to win the support of Congressmen Brooks and Horton, they do not appear willing to concede this point [66]. Senator Durenberger does not feel this particular part of the regulation is a problem and GAO has stated that "federal agencies need the information in order to make a proper determination of an indirect cost rate" [23:749].

C. THE PROPOSALS ARE NOT FORCEFUL ENOUGH

While most of the criticisms levied against the OMB and DOD approach to lobbying cost regulation stressed that proposals were too strict, there have been critics who have felt the proposals are not adequate to control these costs. The DOD Inspector General is on record as believing the cost principles are poorly conceived and will not afford the Government the needed protection from lobbying costs being charged to DOD contracts [26:2]. An area that particularly bothers the DOD Inspector General concerns the section which calls for

the option of advance agreements between the Government and contractors on the applicability of the regulations. In attacking this provision, he stated that "if this proposed cost principle is so unclear that it requires advance agreements on interpretation or application it should be rewritten" [26:2]. His alternative solution is for DOD to maintain its current cost principle contained in the DOD FAR Supplement [26:1].

The viewpoint of one of the conservative critics of the proposals is that they are "a bastardized product of political accommodation rather than the result of reliance on either logic or principle" [67:46]. Feeling that the proposals will not accomplish anything significant, he further stated that "Mr. Reagan's team, by ducking its challenge and obscurring the issues, may have escaped the noisy wrath of thousands of left-wing groups which will not remain free to pick the pockets of the American people to underwrite their advocacy" [67:39].

D. WHERE WE ARE TODAY

With the latest revisions of the OMB and FAR proposals ready to go into effect on May 29, it appears that the executive agencies finally have a uniform cost principle to regulate lobbying costs. Categorized by OMB as "the best consensus we could get" [23:750], it is still not without its major critics. The future of Senator Durenberger's bill is unknown at this time. An aide to the Senator feels that there are two possible scenarios for the legislation, depending on final

public accceptance [35]. Continued controversy, which does not appear too likely at this time, would create impetus for Congressional action on either Senator Durenberger's bill or substitute legislation [35]. With the bill satisfying a majority of the involved parties, the Durenberger bill is not seen as having the required support or need for inactment [35]. This is a result of a perceived lack of support by both the Democratic members of the House of Representatives and the Administration [35].

The controversy that has been generated over the regulations has been by and large resolved in favor of the initial critics of the lobbying proposals. As was pointed out by an observer over the outcry by the January 1983 proposal, "OMB officials are getting a belated lesson on why recipients of federal largess lobby in the first place: it works" [29:370].

VII. CONCLUSIONS AND RECOMMENDATIONS

A. CONCLUSIONS

As a result of this study, the following conclusions are presented:

Conclusion #1. The FAR gives adequate guidance for determining the allowability and allocability of lobbying costs.

Applying the guidance of the FAR to the regulation of lobbying costs is equivalent to its application to other unallowable costs. The accounting concept is no different between lobbying and other unallowable costs and does not place an undue burden on contractors.

Conclusion #2. There is no solid evidence that the intent of the Executive Department was to do anything other than regulate the use of Federal funds for lobbying.

The claim of many critics that the purpose of the lobbying regulations was to "defund the left" does not stand up to scrutiny. The initial stricter application by DOD to defense contractors refutes this contention.

Conclusion #3. The regulations on lobbying should apply equally to everyone.

If lobbying expenditures are deemed to be an unallowable cost in Federal grants and contractors, they should be unallowable for all organizations. There is no evidence that any one organization's lobbying contributes more to effective

acquisition or efficiency in Government than another. For fairness, the lobbying regulations should apply equally.

Conclusion #4. The enforceability of the regulations is a valid concern.

Realiance on "goodwill" and "self certification" by contractors to enforce the regulations could result in abuses that will not be discovered by Government auditors. Without access to all contractor records and the requirement to maintain complete records of lobbying activities, it will not be possible to ensure the proper treatment of all lobbying costs.

Conclusion #5. The executive agencies do not know the amount of lobbying costs that have been charged to Government contracts.

In public testimony and private interviews, OMB, DOD, and GAO all admitted they did not know the magnitude of contractor and grantee lobbying expenditures that have been charged to Federal agencies. While there have been isolated audits of specific organizations to discern these costs, there is no evidence of a Government-wide effort to quantify these costs.

Conclusion #6. The Constitutional questions concerning the regulations should be decided by the Judicial System.

Although the Executive and Congressional segments of the Government should take Constitutional considerations into account when formulating regulations and legislation, the proper forum to answer these questions is the Judiciary. Accordingly, any Constitutional questions concerning the lobbying

regulations should be decided by the courts, if and when, a specific court case is raised.

Conclusion #7. Politics has played a dominant role in trying to formulate lobbying regulations.

The political aspects of which branch of the Federal Government is responsible for formulating a lobbying cost principle, which political ideologies would be affected the most by the regulations, and the perceived effect the regulations will have on individual rights appear to have overshadowed the merits of the regulations.

Conclusion #8. The perceived effect of the regulations on the flow of information between contractors and Congress is illusionary.

Interviews with defense contractor representatives and DOD acquisition policy personnel indicated that defense contractors would still provide Congress with information regardless of the allowability of costs. Contractors feel they must communicate with Congress to ensure their competitive position in their industries.

Conclusion #9. The requirement that any allowable information supplied to Congress by contractors and grantees predicated on a written request is not necessary and could become discriminatory in nature.

If it is considered an allowable cost activity to supply information to Congress, a written request requirement could

become a simple form letter sent to everyone who might be remotely connected to a Congressional hearing. The expense of the administration of these requests could become costly and burdensome to both Congress and the private sector. In addition, the written request requirement could be used to pick and choose the information Congress would hear based solely on political considerations.

Conclusion #10. The regulations are necessary to ensure there is not an abuse by contrators and grantees in the use of Federal funds for lobbying.

Although the exact amount of Government funding that is subsidizing lobbying is not known, there has been evidence of abuse in this area. To ensure that this does not continue, the regulation of lobbying costs is necessary.

Conclusion #11. The critics of the regulations have achieved most of their goals professed in their oppositions to the regulations.

The latest proposals by OMB and DOD issued on 27 April 1984 have acquiessed on almost all the controversial issues in the preceding proposals. With few exceptions, the resulting product on the lobbying cost principle was highly satisfactory to a majority of the involved organizations.

B. RECOMMENDATIONS

As a result of this research, the following recommendations are offered:

Recommendation #1. OMB and DOD should implement the proposed regulations as quickly as possible.

There has been a fifteen month delay from the initial OMB proposal. Any more delay to further modify the regulations does not appear to serve any purpose. The regulations are needed and must be implemented to conduct any further research into the lobbying cost issue.

Recommendation #2. Utilizing the required indirect cost proposal requirement on lobbying costs, DOD should monitor amounts reported by contractors on legislative liaison, state, and local lobbying.

Since no one in DOD appears to have data on the magnitude of lobbying expenditures by contractors, this data is necessary to truly ascertain if the proposed regulations are effective. This could be done by contracting offices reporting this information to a centralized point in DOD for compilation. Reporting requirements should be as simplified as possible to achieve the desired results and not add another burden to contracting activities. This will enable DOD to make a rational evaluation on the dollars being used for lobbying and whether modifications to the regulations are necessary.

Recommendation #3. Personnel involved in auditing should report any actual problems encountered in enforcing the regulations as they are written.

The many concerns mentioned on the enforceability of the regulations should not be ignored after implementation. To ensure that the regulations achieve the desired control of Federal funding of lobbying, the enforceability question should be re-examined after audits have been conducted.

Recommendation #4. No further action should be taken on S.2251.

Regulation by the executive agencies should be utilized to enforce a lobbying cost principle instead of the legislative approach of S.2251. It is the function of the executive agencies to regulate the acquisition process and Congressional intervention might set a bad precedent. If Congress legislates one unallowable cost, it might seem necessary for them to legislate all regulations involving the acquisition process. This would be both burdensome to Congress and would severely hamper the agencies in their administration of grants and contracts.

C. ANSWERS TO RESEARCH QUESTIONS

1. What effect will the proposed changes to Federal regulations concerning the allowability of lobbying costs have on the relationship between private industry and the Federal Government? With the latest proposed change to the FAR, most of the concerns of private industry have been satisfied. This has resulted in little, if any, impact on how private industry conducts its business with the Federal Government and should not jeopardize any future relationships due to lobbying regulations.

2. What is the definition and applicability of lobbying costs according to law and regulation? Chapters II and III of this thesis address this question. The definition of lobbying costs have evolved through various laws and regulations to its current usage in the April 1984 executive agency proposals and the Internal Revenue Code.

3. What are the political implications and ramifications of proposed and current regulations? Chapters II and V address these issues. The political implications are varied and have played a significant role in dealing with the lobbying regulation issue. At times, politics has overshadowed the merits of the proposals to their detriment.

4. What is the position of private industry on the regulations? Private industry appears satisfied with the latest regulation of lobbying costs proposed in the April 1984 FAR change. However, private industry was highly critical of many aspects in the prior proposals and made this criticism well known.

5. What is the position of DOD on the regulations? After eighteen months of strong opposition to a less restrictive approach on lobbying costs, DOD officially agreed to the April 1984 proposals. At the time of the agreement, there was no specific reasons given by DOD as to why their position was changed.

6. What effect will the regulations have on Congressional

procedures? The latest proposals will not have any major effect on the relationship between private industry and the Congress. Lobbying will still continue and a major portion of it will be unregulated. The legislation proposed by Senator Durenberger does not appear to have a great deal of support and probably will not be enacted into law.

D. FURTHER RESEARCH

At this time there does not appear to be any need for further research in the lobbying regulation area. Once the regulations have been implemented and sufficient data has been generated, this data should be reviewed to ascertain the effectiveness of the regulations.

E. OBSERVATIONS BY THE AUTHOR

The political interference in the attempt by the executive agencies to establish a cost principle to regulate lobbying costs is symptomatic of the political involvement in a good many of the acquisition policies formulated in the Federal Government. This interference has, unfortunately, subjected the merits of the lobbying policy to a secondary status of importance and elevated the political aspects. This type of attitude by the Congress and the private sector organizations is severely hampering any true reforms in the acquisition process. When Congress utilizes the defense procurement process solely for political gains, costs will inevitable rise throughout

the procurement process and the wisdom and benefits of the acquisition policies will be circumspect. The ability of defense contractors to utilize their political power with Congress to weaken DOD acquisition initiatives has brought about similar results. In an era of rising defense budgets and the large Federal deficit, any waste in the defense procurement process can only exacerbate the problem. Allowing contractors and grantees to continue most of their lobbying activities with Federal funding has not reduced any costs or improved the procurement process. Congressional micro-management of the acquisition process that was becoming more evident in the recent past is evident in its treatment of the lobbying proposals. This micro-management has not reduced any costs or improved the acquisiton process in any discernable manner. As is evident by the manpower expense by OMB and DOD required to justify acquisition policy in regulating lobbying costs, this action by Congress appears to be adding costs to the process. To achieve optimum efficiency and effectiveness, the executive departments should not be overly constrained by Congress and the political influence of interest groups in determining acquisition policy.

The result of the fifteen month debate over the regulation of lobbying costs is a regulation that applies to only a small portion of the overall involved costs. Legislative liaison, state lobbying, and local lobbying are business decisions that

contractors should utilize earned profits to pay for. The amount to spend should be determined by the long range benefits accrued to the contractor and not by the ability to be reimbursed by the Government for costs incurred. A cost type of contract should be utilized to offset risk in developing a product that is not exactly specified and is technologically ambitious. These are the types of costs that should be reimbursed--not costs that will only benefit the business position of the contractor. The current proposals by OMB and DOD will not regulate most indirect lobbying and have lost a majority of the effectiveness of the initiatives. A DOD lobbying policy that was in effect for less than two years has been scrapped with no large justification. Defense contractor representatives admitted that they had no data as yet on the effects of the DOD regulations.

The lack of a well-conceived initial proposal by OMB severely handicapped their goal of any effective lobbying regulation. It was too broad in scope and overly restrictive in many areas. It created a broad coalition of opposition that was too strong to overcome in the long run. This, coupled with an inability of the executive agencies to agree on what should be regulated, resulted in a cost proposal that appears to regulate very little.

APPENDIX A

APRIL 27, 1984 PROPOSED CHANGE TO OMB CIRCULAR A-122

1. Insert a new paragraph in attachment B, as follows: "B21 Lobbying"

a. Notwithstanding other provisions of this Circular, costs associated with the following activities are unallowable:

a.(1) Attempts to influence the outcomes of any Federal, State, or local election, referendum, initiative, or similar procedure, through in kind or cash contributions, endorsements, publicity, or similar activity;

a.(2) Establishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee, or other organization established for the purpose of influencing the outcomes of elections;

a.(3) Any attempt to influence: (i) The introduction of Federal or state legislation; or (ii) the enactment or modification of any pending Federal or state legislation through communication with any member or employee of the Congress or state legislature (including efforts to influence State or local officials to engage in similar lobbying activity), or with any government official or employee in connection with a decision to sign or veto enrolled legislation;

a.(4) Any attempt to influence: (i) The introduction of Federal or state legislation; or (ii) the enactment or modification of any pending Federal or state legislation by

preparing, distributing or using publicity or propaganda, or by urging members of the general public or any segment thereof to contribute to or participate in any mass demonstration, march, rally, fundraising drive, lobbying campaign or letter writing or telephone campaign; or

a.(5) Legislative liaison activities, including attendance at legislative sessions or committee hearings, gathering information regarding legislation, and analyzing the effect of legislation, when such activities are carried on in support of or in knowing preparation for an effort to engage in unallowable lobbying.

b. The following activities are excepted from the coverage of subparagraph a:

b.(1) Providing a technical and factual presentation of information on a topic directly related to the performance of a grant, contract or other agreement through hearing testimony, statements or letters to the Congress or a state legislature, or subdivision, member, or cognizant staff member thereof, in response to a documented request (including a Congressional Record notice requesting testimony or statements for the record at a regularly scheduled hearing), made by the recipient member, legislative body or subdivision, or a cognizant staff member thereof; provided such information is readily obtainable and can be readily put in deliverable form; and further provided that costs under this section for

travel, lodging or meals are unallowable unless incurred to offer testimony at a regularly scheduled Congressional hearing pursuant to a written request for such presentation made by the Chairman or Ranking Minority Member of the Committee or Subcommittee conducting such hearing.

b.(2) Any lobbying made unallowable by section a.(3) to influence State legislation in order to directly reduce the cost, or to avoid material impairment of the organization's authority to perform the grant, contract, or other agreement.

b.(3) Any activity specifically authorized by statute to be undertaken with funds from the grant, contract, or other agreement.

c.(1) When an organization seeks reimbursement for indirect costs, total lobbying costs shall be separately identified in the indirect cost rate proposal, and thereafter treated as other unallowable activity costs in accordance with the procedures of paragraph B3 of Attachment A.

c.(2) Organizations shall submit as part of their annual indirect cost rate proposal a certification that the requirements and standards of this paragraph have been complied with.

c.(3) Organizations shall maintain adequate records to demonstrate that the determination of costs as being allowable or unallowable pursuant to paragraph B21 complies with the requirements of this Circular.

c.(4) Time logs, calendars, or similar records documenting the portion of an employee's time that is treated as an indirect cost shall not be required for the purposes of complying with subparagraph c, and the absence of such records which are not kept pursuant to the discretion of the grantee or contractor, will not serve as a basis for disallowing claims of allowable costs by contesting estimates of unallowable lobbying time spent by employees during any calendar month unless: (i) The employee engages in lobbying, as defined in subparagraphs a and b, more than 25% of his compensated hours of employment during that calendar month; or (ii) the organization has materially misstated allowable or unallowable costs within the preceding five year period.

c.(5) Agencies shall establish procedures for resolving in advance, in consulation with OMB, any significant questions or disagreements concerning the interpretation or application of paragraph B21. Any such advance resolution shall be binding in any subsequent settlements, audits or investigations with respect to that grant or contract for purposes of interpretation of this Circular; provided, however, that this shall not be construed to prevent a contractor or grantee from contesting the lawfulness of such a determination.

2. Renumber subsequent paragraphs of Attachment B.

APPENDIX B

APRIL 27, 1984 PROPOSED CHANGE TO FAR 31.205-22

1. Subsection 31.205-22 is revised to read as follows:

31.205-22 Lobbying costs.

(a) Costs associated with the following activities are unallowable:

(1) Attempts to influence the outcomes of any Federal, State, or local election, referendum, initiative, or similar procedure, through in kind or cash contributions, endorsements, publicity, or similar activities;

(2) Establishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee, or other organization established for the purpose of influencing the outcomes of elections;

(3) Any attempt to influence (i) the introduction of Federal or state legislation, or (ii) the enactment or modification of any pending Federal or state legislation through communication with any member or employee of the Congress or state legislature (including efforts to influence state or local officials to engage in similar lobbying activity), or with any government official or employee in connection with a decision to sign or veto enrolled legislation;

(4) Any attempt to influence (i) the introduction of Federal or state legislation, or (ii) the enactment or modification of any pending Federal or state legislation by preparing,

distributing or using publicity or propaganda, or by urging members of the general public or any segment thereof to contribute to or participate in any mass demonstration, march, rally, fund raising drive, lobbying campaign or letter writing or telephone campaign; or

(5) Legislative liaison activities, including attendance at legislative sessions or committee hearings, gathering information regarding legislation, and analyzing the effect of legislation, when such activities are carried on in support of or in knowing preparation for an effort to engage in unallowable activities.

(b) The following activities are excepted from the coverage of (a) above:

(1) Providing a technical and factual presentation of information on a topic directly related to the performance of a contract through hearing testimony, statements or letters to the Congress or a state legislature, or subdivision, member, or cognizant staff member thereof, in response to a documented request (including a Congressional Record notice requesting testimony or statements for the record at a regularly scheduled hearing) made by the recipient member, legislative body or subdivision, or a cognizant member thereof; provided such information is readily obtainable and can be readily put in deliverable form; and further provided that costs under this section for transportation, lodging or meals

are unallowable unless incurred for the purpose of offering testimony at a regularly scheduled Congressional hearing pursuant to a written request for such presentation made by the Chairman or Ranking Minority Member of the Committee or Subcommittee conducting such hearing.

(2) Any lobbying made unallowable by (a)(3) above to influence state legislation in order to directly reduce contract cost, or to avoid material impairment of the contractor's authority to perform the contract.

(3) Any activity specifically authorized by statute to be undertaken with funds from the contract.

(c) When a contractor seeks reimbursement for indirect costs, total lobbying costs shall be separately identified in the indirect cost rate proposal, and thereafter treated as other unallowable activity costs.

(d) Contractors shall submit as part of their annual indirect cost rate proposals a certification that the requirements and standards of this subsection have been complied with.

(e) Contractors shall maintain adequate records to demonstrate that the certification of costs as being allowable or unallowable pursuant to this subsection complies with the requirements of this subsection.

(f) Time logs, calendars, or similar records documenting the portion of an employee's time that is treated as an indirect cost shall not be required for the purposes of complying

with this subsection, and the absence of such records which are not kept pursuant to the discretion of the contractor will not serve as a basis for disallowing allowable costs by contesting estimates of unallowable lobbying time spent by employees during any calendar month unless; (1) the employee engages in lobbying, as defined in (a) and (b) above, more than 25% of the employee's compensated hours of employment during that calendar month; or (2) the organization has materially misstated allowable or unallowable costs within the preceding five year period.

(g) Existing procedures should be utilized to resolve in advance any significant questions or disagreements concerning the interpretation or application of this subsection.

98TH CONGRESS
2D SESSION

S. 2251

To establish a uniform Federal policy governing the use of Federal funds for lobbying by contractors and grantees, and to provide for the disclosure to Members of Congress of the costs of certain exempted activities.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 2 (legislative day, JANUARY 30), 1984

Mr. DURENBERGER introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

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A BILL

To establish a uniform Federal policy governing the use of Federal funds for lobbying by contractors and grantees, and to provide for the disclosure to Members of Congress of the costs of certain exempted activities.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Uniform Lobbying Cost Principles Act of 1984".

SEC. 2. Except as otherwise provided under Federal law, a commercial or nonprofit organization shall not allocate the cost of influencing legislation to—

(1) a Federal or federally assisted grant or cooperative agreement, other than a block grant; or

(2) a contract with a Federal agency, other than a competitive firm fixed price contract.

DEFINITIONS

SEC. 3. (a) As used in this Act the term—

(1) "influencing legislation", except as otherwise provided in paragraph (2), means—

(A) any attempt to influence legislation through trying to affect the opinions of the general public or any segment thereof, and

(B) any attempt to influence legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of legislation,

(2) "influencing legislation" for the purpose of this section, does not include—

(A) making available the results of nonpartisan analysis, study, or research;

(B) providing technical advice or assistance (where such advice would otherwise constitute the influencing of legislation) to a governmental body or to a committee or a subdivision thereof in

response to a request by any official or employee of such body or subdivision, as the case may be;

(C) communication between an organization and its bona fide members with respect to legislation or proposed legislation of direct interest to the organization and such members, other than communications described in subsection (b);

(D) any communication with a government official or employee, other than—

(i) a communication with a member or employee of a legislative body (where such communication would otherwise constitute the influencing of legislation), or

(ii) a communication the principal purpose of which is to influence legislation;

(E) any communication (where such communication would otherwise constitute the influencing of legislation) in connection with an employee's service as an elected or appointed government official or member of a governmental advisory panel; and

(F) any communication (where such communication would otherwise constitute the influencing of State legislation)—

(i) in a State which has waived the applicability of this Act to such communication pursuant to section 4(a) of this Act, or

(ii) with respect to a possible decision by a governmental body or committee or subdivision thereof which might affect the ability of the organization or cost to the organization of performing any grant, cooperative agreement, or contract described in section 2 of this Act;

(3) "legislation" includes action with respect to Acts, bills, resolutions, or similar items by the Congress or any State legislature, or by the public in a referendum, initiative constitutional amendment, or similar items;

(4) "action", when used with respect to legislation, is limited to introduction, amendment, enactment, defeat, or repeal;

(5) "making available" means the least costly method of communicating the results of nonpartisan analysis, study, or research to an official or employee of a governmental body or committee or subdivision thereof;

(6) "nonprofit organization" means any organization described in sections 501 (c)(3) and (c)(4) of the

Internal Revenue Code of 1954 (26 U.S.C. 501(c) (3) and (4));

(7) "the cost of influencing legislation" means the total of expenditures knowingly undertaken in direct support of a communication when the purpose of such communication is to influence legislation; and

(8) "governmental body" means a Federal, or State executive or legislative body.

(b)(1) A communication between an organization and any bona fide member of such organization to directly encourage such member to communicate as provided in subsection (a)(1)(B) shall be treated as a communication described in such subsection.

(2) A communication between an organization and any bona fide member of such organization to directly encourage such member to urge persons other than members to communicate as provided in either subparagraph (A) or (B) of paragraph (1) shall be treated as a communication described in paragraph (1)(A).

STATE WAIVER

SEC. 4. (a) A State may waive the application of this Act to all communications which would otherwise constitute the influencing of State legislation by notifying the Director of Management and Budget of such election in writing.

(b) Except as provided in section 3(a)(2)(F)(ii), nothing in this Act shall prohibit a State which has provided a notification under subsection (a) from promulgating uniform rules for the allocation of the cost of influencing State legislation under federally assisted grants or cooperative agreements which are administered by such State.

DISCLOSURE OF FUNDING

SEC. 5. (a) Whenever the cost of an organization's technical advice or assistance to a Member of Congress, or the Member's staff, under section 3(a)(2)(B) will (1) be allocated to a grant, agreement, or contract described in section 2, pursuant to this Act, and (2) the amount so allocated will exceed $100, the organization shall provide a written notice to such Member setting forth the actual or estimated cost of such advice or assistance, and specifying the particular grant, agreement, or contract to which such costs will be allocated.

(b) This section shall not apply with respect to any activity which has been specifically authorized by Congress.

(c) Whenever the cost of a communication described in subsection (a) will be allocated to more than one grant, agreement, or contract, an organization may, in lieu of specifying the particular Federal or federally assisted grant or agreement, or the particular contract with a Federal agency, to which such cost will be allocated, provide an estimate of the percentage of the organization's total revenues which are

derived from Federal or federally assisted grants or agreements, or from contracts with a Federal agency.

ADMINISTRATION

SEC. 6. (a) The Director of the Office of Management and Budget (hereinafter referred to as the "Director") shall promulgate in full and open consultation with the heads of other Federal agencies, interested commercial and nonprofit organizations, and the Congress, such uniform guidelines as are minimally necessary to carry out this Act. Such consultation shall include public hearings designed to educate affected parties with respect to the applicability and intent of this Act.

(b) The heads of Federal agencies shall implement by regulations the guidelines promulgated under subsection (a).

(c) The guidelines promulgated under subsection (a) shall be developed in full accord with the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.) and chapter 6 of title 5, United States Code.

(d) Prior to promulgating any guidelines under subsection (a), the Director shall identify and publicize any authorization in the laws of the United States which permits any communication the purpose of which is to influence legislation.

REPEALS

SEC. 7. Notwithstanding any other provision of law, any portion of any Federal rule, regulation, circular, or guideline which is in conflict with this Act is hereby superseded.

EFFECTIVE DATE

SEC. 8. This Act shall take effect on the date of its enactment.

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APPENDIX D

CHRONOLOGY OF EXECUTIVE BRANCH AND CONGRESSIONAL ACTION ON LOBBYING

1. December 1977 - Proposed Change to ASPR - never incorporated into the regulations
2. November 1979 - Proposed Change to DAR - never incorporated into the Regulations
3. October 1981 - Original Lobbying Cost Principle DAR 15.205-51
4. November 1981 - Senate Bill S.1969 introduced - no action taken by Congress
5. November 1982 - Change to DAR 15.205-51 - made legislative liaison unallowable costs
6. November 1982 - GSA Lobbying Cost Principle FPR 1-15.205-52
7. January 1983 - OMB Proposed Revision to Circular A-122, DOD Proposed Change to DAR 15.205-51, and GSA Proposed Change to FPR 1-15.205-52 - all withdrawn with no action
8. November 1983 - Reissuance of OMB, DOD and GSA Proposals
9. January 1984 - Senate Bill S.2251 Introduced
10. April 1984 - FAR and DOD FAR Supplement Go Into Effect
11. April 1984 - OMB, FAR Issue Latest Revision on Lobbying

APPENDIX E

DEFINITIONS OF LOBBYING

1. Webster's Third International Dictionary

To conduct activities (as engaging in personal contacts or the dissemination of information) with the objective of influencing public officials and esp. members of a legislative body with regard to legislation and other policy decisions

2. Internal Revenue Service Code 26 USC 4911

Lobbying expenditures for the purpose of influencing legislation

influencing legislation - (a) any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof, and (b) any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation.

3. December 1977 Proposed Change to ASPR

Any activity or communication which is intended or designed to directly influence Members of Congress, their staffs or committee staffs to favor or oppose pending, proposed or existing federal legislation or appropriation.

4. November 1979 Proposed Change to DAR

Any activity the purpose of which is to affect any legislation or other official actions of the U. S. Congress, its members and employees, either directly through employment of a third party or by encouraging its officers or employees to do so

5. October 1981 Revision to DAR

Any activity or communication which is intended or designed to directly influence or to engage in any campaign to encourage others to influence members of the Congress, their staffs, or the staffs of committees of the Congress to favor or oppose

legislation, appropriations or other actions of the Congress, its members or its committees, for the procurement of specific supplies or services by the federal government.

6. November 1982 Revision to DAR, 4 November 1983 Proposed Revision to DAR, and DOD FAR Supplement Implemented 1 April 1984

Any activity including legislative liaison, or communication which is intended or designed to influence, directly or indirectly, or to engage in any campaign to encourage others to influence members of any legislative body, their staffs, or the staffs of their committees to favor or oppose legislation, appropriations, or other actions of the legislative body, its members, or its committees.

7. November 1982 Revision to FPR, 4 November 1983 Proposed Revision to FPR, and FAR Implemented 1 April 1984

Any activity or communication designed to directly influence members of the U.S. Congress or State and local legislatures, their staffs or the staffs of committees of these bodies to favor or oppose pending, proposed, or existing legislation, appropriations, or other official actions of these bodies, their members, or their committees, or to engage in any campaign to directly encourage others to do so.

8. 20 January 1983 Proposed Revision to DAR, FPR, and OMB Circular A-122

(a) Attempting to influence the outcome of any Federal, State, or local election, referendum, initiative, or similar procedure, through contributions, endorsements, publicity or similar activity
(b) Establishing, administering, contributing to, or paying the expenses of a political action committee, either directly or indirectly
(c) Attempting to influence governmental decisions through an attempt to affect the opinions of the general public or any segment thereof
(d) Attempting to influence governmental decisions through communication with any member or employee of a legislative body, or with any governmental official or employee who may participate in the decisionmaking process
(e) Participating in or contributing to the expenses of litigation other than litigation in which the organization is a party with standing to sue or defend on its own behalf

(f) Contributing money, services, or any other thing of value, as dues or otherwise, to an organization that has political advocacy as a substantial organizational purpose, or that spends $100,000 or more per year on activities constituting political advocacy

9. 4 November 1983 Proposed Revision to OMB Circular A-122

(a) Attempts to influence the outcome of any Federal, State, or local election, referendum, initiative, or similar procedure, through in kind or cash contributions, endorsements, publicity, or similar activity
(b) Establishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee, or other organization established for the purpose of influencing the outcomes of elections
(c) Attempts to influence legislation pending before Congress or a State legislature by communicating with any member or employee of the Congress or legislature (including efforts to influence state or local officials to engage in similar lobbying activity), or with any government official or employee in connection with a decision to sign or veto enacted legislation
(d) Preparation, distribution, or use of publicity or propaganda designed to influence legislation pending before Congress or a State legislature by urging members of the general public or any segment thereof to contribute to or participate in any mass demonstration, march, rally, or fundraising drive, lobbying campaign, or letter-writing or telephone campaign, for the purpose of influencing such legislation
(e) Legislative liaison activities, including attendance at legislative sessions or committee hearings, gathering information regarding pending legislation, and analyzing the effect of pending legislation, except to the extent that such activities do not relate to lobbying or related activities as defined in paragraph 1.b. hereof

10. 27 April 1984 Proposed Revision to FAR and OMB Circular A-122

(a) Attempts to influence the outcomes of any Federal, State, or local election, referendum, initiative, or similar procedure, through in kind or cash contributions, endorsements, publicity, or similar activities
(b) Establishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee, or other organization established for the purpose of influencing the outcomes of elections

(c) Any attempt to influence the introduction of Federal or state legislation; or the enactment or modification of any pending Federal or state legislation through communication with any member or employee of the Congress or state legislature (including efforts to influence State or local officials to engage in similar lobbying activity), or with any government official or employee in connection with a decision to sign or veto enrolled legislation

(d) Any attempt to influence the introduction of Federal or state legislation; or the enactment or modification of any pending Federal or state legislation by preparing, distributing or using publicity or propaganda, or by urging members of the general public or any segment thereof to contribute to or participate in any mass demonstration, march, rally, fundraising drive, lobbying campaign or letter writing or telephone campaign

(e) Legislative liaison activities, including attendance at legislative sessions or committee hearings, gathering information regarding legislation, and analyzing the effect of legislation, when such activities are carried on in support of or in knowing preparation for an effort to engage in unallowable lobbying.

APPENDIX F

DECEMBER 1977 PROPOSED CHANGE TO ASPR

PROPOSED NEW ASPR 15-205.51

15-205.51 Lobbying Costs (CWAS-NA).

(a) Lobbying is defined as any activity or communication which is intended or designed to directly influence Members of Congress, their staffs or committee staffs to favor or oppose pending, proposed or existing federal legislation or appropriations. Lobbying includes but is not limited to personal discussions or conferences, advertising, sending telegrams, engaging in telephonic communications, and letters.

(b) The costs of lobbying, including the applicable portion of the salaries and fees of those individuals engaged in lobbying efforts in behalf of a contractor, regardless of whether or not the individuals are registered as lobbyists under any applicable law, are unallowable. In addition, the directly associated costs (see 15-205.6) of lobbying are unallowable.

(c) The definition of lobbying does not include legislation liaison activities such as attendance at committee hearings, appearances before committee hearings at the request of the committee, and gathering information regarding pending legislation, provided, however, that the attendance or effort of those individuals involved are not part of a lobbying plan or campaign. In order for the costs of such

liaison activity to be allowable, however, the contractor must submit documentation sufficient to establish clearly the nature and purpose of the activity to which the costs relate and which demonstrates that none of the claimed costs constitute directly associated costs of unclaimed lobbying costs.

APPENDIX G

NOVEMBER 1979 PROPOSED CHANGE TO DAR

PROPOSED NEW DAR 15-205.51

[15-205.51 Lobbying Costs (CWAS-NA)

(a) Lobbying is defined as any activity the purpose of which is to affect any legislation or other official actions of the U.S. Congress, its members and employees, either directly through employment of a third party or by encouraging its officers or employees to do so. Except as provided in (c) below, such activities include but are not necessarily limited to appearances before Congressional committees or subcommittees, all forms of written or oral communications, such as face-to-face discussions or conferences, telephonic conversations, advertisements, and the sending of telegrams or letters.

(b) The costs of lobbying, including the applicable portion of the salaries and fees of those individuals engaged in lobbying efforts on behalf of a contractor, whether or not the individuals are registered as lobbyists under any applicable law, are unallowable.

(c) Legislative liaison activities such as attendance at committee hearings, and gathering information regarding pending legislation are not lobbying and are allowable. In addition, written or oral communications, appearances before Congressional committees and subcommittees, and meetings with Congressional representatives are allowable legislative liaison

activities when such efforts are undertaken after receipt of an invitation or request from a Congressional source and the invitation or request is documented. The contractor shall maintain and make available to the Government, records and documentation sufficient to establish the nature and purpose of those activities claimed as legislative liaison.]

APPENDIX H

OCTOBER 1981 CHANGE TO DAR 15.205-51

ADD the following to DAR Section XV Part 2:

15-05.51 Lobbying Costs

(a) For the purpose of this section lobbying is defined as [any activity or communication which is intended or designed to directly influence or to engage in any campaign to encourage others to influence members of the Congress, their staffs, or the staffs of committees of the Congress to favor or oppose legislation, appropriations or other actions of the Congress, its members, or its committees, for the procurement of specific supplies or services by the federal government.] Except as provided in (c) below, lobbying activity includes, but is not limited to, all forms of communications by the contractor, its employees, or its agents with the Congress, its members, and staffs of members and committees for the above-mentioned purpose.

(b) The costs of lobbying as defined herein, including the applicable portion of the salaries of the contractor's employees and the fees of individuals or firms engaged in lobbying, on behalf of the contractor (whether or not the individuals or firms are registered as lobbyists under any applicable law) are unallowable. In addition, the directly associated costs (see 15-201.6) of lobbying are unallowable.

(c) Legislative liaison activities, such as attendance at committee hearings, gathering information regarding pending legislation, analysis of the effect of pending legislation, and the like are not lobbying and are allowable. In addition, communications that would be considered lobbying in accordance with (a) above shall be allowable if they are performed after receipt of an invitation or request from a congressional or executive branch source.

APPENDIX I

NOVEMBER 1982 CHANGE TO DAR 15.205-51

15-205.51 Lobbying Costs. (CWAS-NA)

(a) For the purpose of this section, lobbying is defined as any activity, including legislative liaison, or communication which is intended or designed to influence, directly or indirectly, or to engage in any campaign to encourage others to influence members of any legislative body, their staffs, or the staffs of their committees to favor or oppose legislation, appropriations or other actions of the legislative body, its members, or its committees. Lobbying activity includes, but is not limited to, all forms of communications for the above-mentioned purposes by the contractor, its employees, or its agents with the legislative body, its members, and staffs of members and committees.

(b) The costs of lobbying as defined herein, including the applicable portion of the salaries of the contractor's employees and the fees of individuals or firms engaged in lobbying, on behalf of the contractor (whether or not the individuals or firms are registered as lobbyists under any applicable law) are unallowable. In addition, the directly associated costs (see 15-201.6) of lobbying are unallowable.

APPENDIX J

NOVEMBER 1982 CHANGE TO FPR 1-15.205-52

§1-15.205-52 Lobbying costs.

(a) For purposes of this section, lobbying is defined as any activity or communication that is intended or designed (1) to directly influence members of the U.S. Congress or State and local legislatures, their staffs or the staffs of committees of these bodies to favor or oppose pending, proposed, or existing legislation, appropriations, or other official actions of these bodies, their members, or their committees, or (2) to engage in any campaign to directly encourage others to do so. Except as provided in paragraph (c) of this section, lobbying includes, but is not limited to, appearances before any legislative committee or subcommittee and written or oral communications, including face-to-face discussions or conferences, telephone conversations, paid advertisements and the sending of telegrams or letters.

(b) The costs of lobbying, including the applicable portion of the salaries and fees of those individuals engaged in lobbying efforts on behalf of a contractor, whether or not the individuals are registered as lobbyists under any applicable law, are unallowable.

(c) Legislative liaison activities, such as attendance at committee hearings and gathering information regarding pending legislation, are not lobbying and are allowable. In

addition, written or oral communications, appearances before legislative committees and subcommittees, and meetings with legislative representatives are allowable legislative liaison activities when such efforts are undertaken in conjunction with a legislative public hearing or meeting in response to a public notice, or a specific invitation or request from a legislative source, and the notice, invitation, or request is documented, the contractor shall maintain and make available to the Government, records and documentation sufficient to identify the costs and clearly establish the nature and purpose of the legislative liaison activity to which the costs relate.

APPENDIX K

JANUARY 1983 PROPOSED CHANGE TO OMB CIRCULAR A-122, DAR 15.205-51, AND FPR 1-15.205-52

Office of Management and Budget
Circular A-122

Cost Principles for Nonprofit Organizations

Circular A-122 is revised by modifying Attachment B as follows:

1. Insert a new paragraph "B 33 Political Advocacy."

a. The cost of activities constituting political advocacy are unallowable.

b. Political advocacy is any activity that includes:

(1) Attempting to influence the outcome of any Federal, State, or local election, referendum, initiative, or similar procedure, through contributions, endorsements, publicity, or similar activity;

(2) Establishing, administering, contributing to, or paying the expenses of a political action committee, either directly or indirectly;

(3) Attempting to influence governmental decisions through an attempt to affect the opinions of the general public or any segment thereof;

(4) Attempting to influence governmental decisions through communication with any member or employee of a legislative body, or with any government

official or employee who may participate in the decisionmaking process;

(5) Participating in or contributing to the expenses of litigation other than litigation in which the organization is a party with standing to sue or defend on its own behalf; or

(6) Contributing money, services, or any other thing of value, as dues or otherwise, to an organization that has political advocacy as a substantial organizational purpose, or that spends $100,000 or more per year on activities constituting political advocacy.

c. Political advocacy does not include the following activities:

(1) Making available the results of nonpartisan analysis, study, or research, the distribution of which is not primarily designed to influence the outcome of any Federal, State, or local election, referendum, initiative, or similar procedure, or any governmental decision;

(2) Providing technical advice or assistance to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision;

(3) Participating in litigation on behalf of other persons, if the organization has received a Federal, State, or local grant, contract, or other agreement for the express purpose of doing so;

(4) Applying or making a bid in connection with a grant, contract, unsolicited proposal, or other agreement, or providing information in connection with such application at the request of the government agency awarding the grant, contract, or other agreement; or

(5) Engaging in activities specifically required by law.

d. An organization has political advocacy as a "substantial organizational purpose" if:

(1) The organization's solicitations for membership or contributions acknowledge that the organization engages in activities constituting political advocacy; or

(2) Twenty percent (20%) or more of the organization's annual expenditures, other than those incurred in connection with Federal, State or local grants, contracts, or other agreements, are incurred in connection with political advocacy.

e. The term, "governmental decisions" includes:

(1) The introduction, passage amendment, defeat, signing, or veto of legislation, appropriations, resolutions, or constitutional amendments at the Federal, State, or local level;

(2) Any rulemakings, guidelines, policy statements or other administrative decisions of general applicability and future effect; or

(3) Any licensing, grant, ratemaking, formal adjudication or informal adjudication, other than actions or decisions related to the administration of the specific grant, contract, or agreement involved.

f. Notwithstanding the provisions of other cost principles in this circular:

(1) Salary costs of individuals are unallowable if:

(a) the work of such individuals includes activities constituting political advocacy, other than activities that are both ministerial and non-material; or

(b) the organization has required or induced such individuals to join or pay dues to an organization, other than a labor union, that has political advocacy as a substantial organizational purpose, or to engage in political advocacy during non-working hours.

(2) The following costs are unallowable:

(a) building or office space in which more than 5% of the usable space occupied by the organization or an affiliated organization is devoted to activities constituting political advocacy;

(b) items of equipment or other items used in part for political advocacy;

(c) meetings and conferences devoted in any part to political advocacy;

(d) publication and printing allocable in part to political advocacy; and

(e) membership in an organization that has political advocacy as a substantial organizational purpose, or that spends $100,000 or more per year in connection with political advocacy.

2. Renumber subsequent paragraphs.

APPENDIX L

NOVEMBER 1983 PROPOSED CHANGE TO OMB CIRCULAR A-122

Office of Management and Budget
Circular A-122

Cost Principles for Nonprofit Organizations

Circular A-122 is revised as follows:

1. Insert a new paragraph in Attachment B, as follows: "B21 Lobbying and Related Activities.

a. (1) Organizations shall include, as part of their annual indirect cost proposal, a statement identifying by category costs attributable in whole or in part to activities made unallowable by subparagraph b, and stating hown they are accounted for.

(2) The certification required as a part of the Financial Status Report required under Attachment G of Circular A-110 shall be deemed to be a certification that the requirements and standards of this paragraph, and of other paragraphs of Circular A-122 respecting "lobbying and related activities," have been complied with.

(3) Organizations shall maintain adequate records to demonstrate that the determination of costs as being allowable or unallowable pursuant to subparagraph a(1) above complies with the requirements of this Circular.

(4) For the purposes of complying with subparagraph a, there will be no requirement for time logs, calendars, or similar records documenting the activities of an employee whose salary is treated as an indirect cost, and the absence of time logs or comparable records for indirect cost employees not kept pursuant to the discretion of the grantee or contractor will not serve as a basis for contesting or disallowing claims, unless: (a) the employee engages in lobbying or related activities more than 25% of the time or (b) the organization has materially misstated allowable or unallowable costs within the preceding five year period. Agency guidance regarding the extent and nature of documentation required pursuant to subparagraph a(3) shall be reviewed under the criteria of the Paperwork Reduction Act, to ensure that requirements are the least burdensome necessary to satisfy the objectives of this subparagraph.

(5) Agencies shall establish procedures for resolving in advance, in consultation with OMB, any significant questions or disagreements concerning the interpretation or application of subparagraphs a or b. Any such advance resolution, if in writing, shall be binding in any subsequent settlements, audits, or investigations with respect to that grant or contract for purposes of interpretation of this Circular.

b. Notwithstanding other provisions of this Circular, costs associated with the following activities are unallowable:

(1) Attempts to influence the outcomes of any Federal, State, or local election, referendum, initiative, or similar procedure, through in kind or cash contributions, endorsements, publicity, or similar activity;

(2) Establishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee, or other organization established for the purpose of influencing the outcomes of elections;

(3) Attempts to influence legislation pending before Congress or a State legislature by communicating with any member or employee of the Congress or legislature, (including efforts to influence state or local officials to engage in similar lobbying activity), or with any government official or employee in connection with a decision to sign or veto enacted legislation;

(4) Preparation, distribution, or use of publicity or propaganda designed to influence legislation pending before Congress or a State legislature by urging members of the general public or any segment thereof to contribute to or participate in any mass demonstration, march, rally, or fundraising drive, lobbying campaign, or letter-writing or telephone campaign, for the purpose of influencing such legislation; or

(5) Legislative liaison activities, including attendance at legislative sessions or committee hearings, gathering information regarding pending legislation, and analyzing the effect of pending legislation, except to the extent that such activities do not relate to lobbying or related activities as defined by paragraph 1.b. hereof.

c. Notwithstanding subparagraph b, costs associated with the following activities are not unallowable under this paragraph:

(1) Providing technical advice or assistance to the Congress or a State legislature or to a member, committee, or other subdivision thereof, in response to a specific written request by such member, legislative body, or subdivision;

(2) Any communication with an executive branch official or employee, other than a communication made expressly unallowable by paragraph 1.b.(3) hereof.

(3) Any activity in connection with an employer's service as an elected or appointed official or member of a governmental advisory panel;

(4) Any lobbying or related activity at the state level for the purpose of influencing legislation directly affecting the ability of the organization or cost to the organization of performing the grant,

contract, or other agreement; however, state governments acting as subgrantors may, through appropriate state processes, waive the current practice under OMB Circular A-102 making Circular A-122 applicable to nonprofit subgrantees with regard to such lobbying activities at the state level as are deemed appropriate.

(5) Any activity specifically authorized by statute to be undertaken pursuant to the federal grant, contract, or other agreement.

2. Renumber subsequent paragraphs of Attachment B

3. Insert language in subparagraph B.4.b of Attachment A, so that it reads as follows:

b. Promotion, lobbying or related activities (as defined by subparagraph B21(b) of Attachment B), and public relations.

APPENDIX M

NOVEMBER 1983 PROPOSED CHANGE TO DAR 15.205-51

(a)(1) Contractors shall include, as part of their annual indirect cost proposals, a statement identifying by category costs attributable in whole or in part to activities made unallowable by subparagraph (b), and stating how they are accounted for.

(2) Contractors shall submit as a part of their annual indirect cost proposal a certification that the requirements and standards of this section respecting "lobbying and related activities," have been complied with.

(3) Contractors shall maintain adequate records to assure that the determination of costs as being allowable and unallowable costs pursuant to subparagraph (a)(1) above complies with the requirements of this section.

(4) For the purposes of complying with paragraph (a), of this section there will be no requirement for time logs, calendars, or similar records, documenting the activities of an employee whose salary is treated as an indirect cost, and the absence of time logs or comparable records for indirect cost employees not kept pursuant to the discretion of the grantee or contractor will not serve as a basis for contesting or disallowing claims, unless: (a) The employee engages in lobbying or related activities more than 25% of the time or (b) the organization has materially misstated allowable or unallowable

costs within the preceding five year period. Agency guidance regarding the extent and the nature of documentation required pursuant to subparagraph (a)(3) shall be reviewed under the criteria of the Paperwork Reduction Act, to ensure that requirements are the least burdensome necessary to satisfy the objectives of this subparagraph.

(5) Contracting officers shall enter into advance agreement where necessary to resolve any significant questions or disagreements concerning the interpretation or application of subparagraphs (a) or (b). Any such advance agreement shall be binding in any subsequent settlements, audits, or investigations with respect to that contract for purposes of interpretation of this section.

(b) Cost associated with the following activities are unallowable:

(1) Attempts to influence the outcome of any Federal, State, or local election, referendum, initiative, or similar procedure, through in kind or cash contributions, endorsements, publicity, or similar activity.

(2) Establishing, administering, contributing to, or paying the expenses of a political action committee, or other organization established for the purpose of influencing the outcomes of elections.

(3) Attempts to influence legislation pending before Congress, State or local legislature by communicating with any

member or employee of the Congress or legislature (including efforts to influence state or local officials to engage in similar lobbying activity), or with any government official or employee in connection with a decision to sign or veto enacted legislation.

(4) Preparation, distribution, or use of publicity or propaganda designed to influence legislation pending before Congress, State or local legislature, by urging members of the general public or any segment thereof to contribute to or participate in any mass demonstration, march, rally, or fund raising drive, lobbying campaign, or letter-writing or telephone compaign, for the purpose of influencing such legislation or regulation.

(5) Legislative liaison activities.

(c) Costs associated with the following activities are not unallowable under this paragraph:

(1) Any communication with an executive branch official or employee, other than a communication made expressly unallowable by paragraph (b)(3) hereof.

(2) Any activity in connection with an employee's service as an elected or appointed official or member of a governmental advisory panel.

(3) Any activity specifically authorized by statute to be undertaken, pursuant to the federal grant, contract, or other agreement.

APPENDIX N

NOVEMBER 1983 PROPOSED CHANGE TO FPR 1-14.205-52

SUBPART 1-15.2 CONTRACTS WITH COMMERCIAL ORGANIZATIONS

3. Section 1-15.205-52 is revised to read as follows:

§ 1-15.205-52 Lobbying and related activities.

(a)(1) Contractors shall include, as part of their annual indirect cost proposal, a statement identifying by category costs attributable in whole or in part to activities made unallowable by paragraph (b) of this section, and stating how they are accounted for.

(2) Contractors shall submit as a part of their annual indirect cost proposal a certification that the requirements and standards of this § 1-15.205-52 have been complied with.

(3) Contractors shall maintain adequate records to assure that the determination of costs as being allowable and unallowable costs pursuant to paragraph (a)(1) above complies with the requirements of this section.

(4) For the purposes of complying with paragraph (a) of this section, there is no requirement for time logs, calendars, or similar records documenting the activities of an employee whose salary is treated as an indirect cost, and the absence of time logs or comparable records for indirect cost employees not kept pursuant to the discretion of the contractor will not serve as a basis for contesting or disallowing claims, unless; (i) the employee engages in lobbying or related

activities more than 25% of the time, or (ii) the organization has materially misstated allowable or unallowable costs within the preceding five year period. Agency guidance regarding the extent and nature of documentaion required pursuant to paragraph (a)(3) of this section shall be reviewed under the criteria of the Paperwork Reduction Act, to ensure that requirements are the least burdensome necessary to satisfy the objectives of this paragraph.

(5) Contracting officers shall enter into advance agreement where necessary to resolve any significant questions or disagreements concerning the interpretation or application of paragraphs (a) or (b) of this section. Any such advance agreement shall be binding in any subsequent settlements, audits, or investigations with respect to contracts for purposes of interpretation of this section.

(b) Costs associated with the following activities are unallowable:

(1) Attempts to influence the outcome of any Federal, State, or local election, referendum, initiative, or similar procedure, through in kind or cash contributions, endorsements, publicity, or similar activity.

(2) Establishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee, or other organization established for the purpose of influencing the outcomes of elections.

(3) Attempts to influence legislation pending before Congress or a State legislature by communicating with any member or employee of the Congress or legislature, (including efforts to influence State or local officials to engage in similar lobbying activity), or with any government official or employee in connection with a decision to sign or veto enacted legislation.

(4) Preparation, distribution, or use of publicity or propaganda designed to influence legislation pending before Congress or a State legislature by urging members of the general public or any segment thereof to contribute to or participate in any mass demonstration, march, rally, or fundraising drive, lobbying campaign, or letter-writing or telephone campaign, for the purpose of influencing such legislation.

(5) Legislative liaison activities, including attendance at legislative sessions or committee hearings, gathering information regarding pending legislation, and analyzing the effect of pending legislation, except to the extent that such activities do not relate to lobbying or related activities defined by paragraph (b) hereof.

(c) Costs associated with the following activities are not unallowable under this § 1-15.205-52:

(1) Providing technical advice or assistance to the Congress or a State legislature or to a member, committee, or other subdivision thereof, in response to a specific written request by such member, legislative body, or subdivision.

(2) Any communication with an executive branch official or employee, other than a communication made expressly unallowable by paragraph (b)(3) of this section.

(3) Any activity in connection with an employee's service as an elected or appointed official or member of a governmental advisory panel.

(4) Any lobbying or related activity at the state level for the purpose of influencing legislation directly affecting the ability of the organization or cost to the organization of performing the contract.

(5) Any activity specifically authorized by statute to be undertaken pursuant to the contract.

LIST OF REFERENCES

1. William Proxmire, United States Senator, to Harold Brown, United States Secretary of Defense, 26 January 1977.

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